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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, ~~1959~~ 1960

No. ~~668~~ 32

C. G. GOMILLION, ET AL., PETITIONERS,

vs.

PHIL M. LIGHTFOOT, AS MAYOR OF THE CITY OF TUSKEGEE, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR CERTIORARI FILED JANUARY 30, 1960.
CERTIORARI GRANTED MARCH 21, 1960.

SUPREME COURT OF THE UNITED STATES

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INDEX

RECORD PRESS, PRINTERS, NEW YORK, N. Y., APRIL 19, 1960

[fol. 1]

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA

[Caption omitted]

C. G. Gomillion, Celia B. Chambers, Alma R. Craig, Frank H. Bentley, Willie D. Bentley, Kenneth L. Buford, William J. White, Augustus O. Young, Jr., Nettie B. Jones, Detroit Lee, Delia D. Sullivan and Lynnwood T. Dorsey on behalf of themselves and others similarly situated, Plaintiffs,

versus

Phil M. Lightfoot, as Mayor of the City of Tuskegee, G. B. Edwards, Jr., L. D. Gregory, Frank A. Oslin, W. Foy Thompson and H. A. Vaughan, Jr. as Members of the Tuskegee City Council; O. L. Hodnett, as Chief of Police of the City of Tuskegee, Alabama; E. C. Leslie, Charles Huddleston, J. T. Dyson, F. C. Thompson and Virgil Guthrie, as Members of the Board of [fol. 2] Revenue of Macon County, Alabama; Preston Hornsby, as Sheriff of Macon County, Alabama; William Varner, as Judge of Probate of Macon County, Alabama, City of Tuskegee, Ala., a Municipal Corp., Defendants.

Appearances:

For Plaintiffs-Appellants: Mr. Fred D. Gray, 113 Monroe Street, Montgomery, Alabama, Mr. Arthur D. Shores, 1630 Fourth Avenue, North Birmingham, Alabama.

For Defendants-Appellees: Mr. Harry D. Raymon, Tuskegee, Alabama; Messrs. Hill, Hill, Stovall & Carter, 2nd Floor, Hill Building, P. O. Box 116, Montgomery, Alabama.

COMPLAINT—Filed August 4, 1958

1.

Jurisdiction

Jurisdiction of this Court is invoked under Title 28, United States Code, Section 1331. This action arises under the due process and equal protection clauses of the Fourteenth Amendment of the Constitution of the United States, [fol. 3] the Fifteenth Amendment of the Constitution of the United States, and under Title 42, United States Code, Section 1981, as hereinafter more fully appears. The matter in controversy, exclusive of interest and costs, exceeds the sum or value of Ten Thousand ($10,000.00) Dollars.

2.

Jurisdiction

Jurisdiction of this Court is also invoked under Title 28, United States Code, Section 1343 (3). This action is authorized by Title 42, United States Code, Section 1983 to be commenced by any citizen of the United States or other person within the jurisdiction thereof to redress the deprivation under color of state law, statute, ordinance, regulation, custom, or usage of rights, privileges and immunities secured by the Fourteenth and Fifteenth Amendments of the Constitution of the United States and by Title 42, United States Code, Section 1981, providing for the equal rights of citizens and all persons within the jurisdiction of the United States, as hereinafter more fully appears. This is an action for temporary and permanent injunction to restrain the defendants, officers of the City of Tuskegee, and of Macon County, Alabama, their agents, employees and their successors in Offices from the enforcement operation and execution of Act No. 140 of the 1957 Regular Session of the Alabama Legislature (passed July 15, 1957), on the grounds that the aforesaid statute denies rights, privileges and immunities secured by the Fourteenth and Fifteenth Amendments of the Constitution

of the United States and by Title 42, United States Code, [fol. 4] Section 1981, as hereinafter more fully appears.

3.

Jurisdiction

This is also a proceeding for declaratory judgment under Title 28, United States Code, Sections 2201 and 2202, declaring the rights and legal relationships of the parties in the matter in controversy, to wit:

Whether the enforcement, execution or operation of Act No. 140 of the 1957 Regular Session of the Alabama Legislature (passed July 15, 1957), as applied to the plaintiffs and the class which they represent, by redefining the City limits to exclude the plaintiffs and the class which they represent from the City of Tuskegee solely because of their race and color, deprives them of the right to vote in municipal elections for the City of Tuskegee, Alabama, denies to them their rights, privileges and immunities as citizens of the United States and the equal protection of the laws as secured by the Fourteenth and Fifteenth Amendments to the Constitution of the United States and rights and privileges secured to them by Title 42, United States Code, Sections 1981 and 1983, and is for the aforesaid reasons unconstitutional and void.

4.

Class Action

Plaintiffs bring this action in their own behalf and on behalf of all other Negro citizens of the United States [fol. 5] and of the State of Alabama, residing within the City limits of Tuskegee, Macon County, as those city limits were constituted prior to the passage of Act No. 140 by the 1957 Regular Session of the Alabama Legislature, which Negro citizens are similarly situated and affected with reference to the matters here involved. The members of this class are so numerous as to make it impracticable to bring them all before the Court. There being common questions of law and fact and a common relief

being sought, as hereinafter more fully appears, this action is brought as a class suit pursuant to Rule 23A of the Federal Rules of Civil Procedure. The members of this class are fairly and adequately represented by the named plaintiffs herein.

5.

Plaintiffs

Plaintiffs are Negro citizens of the United States and of the State of Alabama who reside within the City limits of Tuskegee, Macon County, as those city limits were constituted prior to the passage of Act No. 140 by the 1957 Regular Session of the Alabama Legislature.

6.

Defendants

The Defendant, Phil M. Lightfoot, is a resident of Macon County, Tuskegee, Alabama, and is Mayor of the City of Tuskegee, Alabama. As such he is the chief executive officer of the City of Tuskegee.

[fol. 6] The Defendants, G. B. Edwards, Jr., L. D. Gregory, Frank A. Oslin, W. Foy Thompson and H. A. Vaughan, Jr., are all residents of Tuskegee and duly elected members of the Tuskegee City Council. As members of the Tuskegee City Council, they are the governing body of said City and are charged by law with the responsibility for seeing to the enforcement of all state statutes and city ordinances affecting the City of Tuskegee.

The Defendant, O. L. Hodnett, is Chief of Police of the City of Tuskegee, and as such Officer, it is his duty to enforce all state statutes and city ordinances affecting the City of Tuskegee, Alabama.

The Defendants, E. C. Leslie, Charles Huddleston, J. T. Dyson, F. C. Thompson and Virgil Guthrie are the duly elected members of the Board of Revenue of Macon County, Alabama, which Board is the general governing body of Macon County.

The Defendant, Preston Hornsby, is the duly elected Sheriff of Macon County, Alabama and as such, he is the

chief law enforcement Officer of said County and is charged by law with the duty to enforce all state statutes affecting Macon County, Alabama.

The Defendant, William Varner, is the duly elected Judge of Probate, whose duty it is, among other things, to compile a list of the qualified registered voters who are eligible to vote in municipal elections in the various cities and towns in Macon County, Alabama, including the City of Tuskegee. The Defendant, the City of Tuskegee, Ala., is a municipal corp. organized and existing [fol. 7] under the Law of the State of Alabama.

7.

Act No. 140

Act No. 140 of the 1957 Regular Session of the Alabama Legislature, passed on July 15, 1957 (attached hereto as plaintiffs' Exhibit No. 1, and made a part of this Complaint), is "An Act to alter, re-arrange, and re-define the boundaries of the City of Tuskegee in Macon County." The aforesaid Act recites no reasons for the change in boundaries, but a map showing the city limits of Tuskegee before and after the passage of the act (attached hereto as plaintiffs' Exhibit No. 2, and made a part of this Complaint) reveals its necessary effect and obvious purpose as hereinafter more fully appears. Prior to the time when Act No. 140 became law, Tuskegee was square-shaped. It contained approximately 5,397 Negroes, of whom about 400 were qualified as voters in the City of Tuskegee and approximately 1,310 white persons, of whom approximately 600 were (and are) qualified voters in said City. As redefined by said Act No. 140, Tuskegee resembles a "sea dragon", with Negro neighborhoods, including the site of the Tuskegee Institute, eliminated. In general, no white persons, but several thousand Negroes including all but four or five qualified voters, have been excluded or "removed" from the City of Tuskegee by Act No. 140. The aforesaid Act deprives plaintiffs and those similarly situated of the right to vote in municipal elections solely on account of their race and color in violation of the Four-

[fol. 8] teenth and Fifteenth Amendments of the Constitution of the United States.

8.

Purpose of Act No. 140

Act No. 140 is another device in a continuing attempt on the part of the State of Alabama to disenfranchise Negro citizens. Tuskegee is located approximately forty miles northeast of Montgomery, Alabama in Macon County, of which it is the County seat. Approximately seven-eighths (7/8) of the persons in Macon County are Negroes.

Macon County had no Board of Registrars to qualify applicants for voter registration for more than eighteen months, from January 16, 1956 to June 3, 1957. Plaintiffs allege that the reason for no Macon County Board of Registrars is that almost all of the white persons possessing the qualification to vote in said County are already registered, whereas thousands of Negroes, who possess the qualifications, are not registered and cannot vote.

The present Act No. 140 was introduced into the Alabama State Legislature on June 7, 1957 by State Senator Sam Engelhardt of Macon County. Senator Engelhardt was at that time Executive Secretary for the White Citizens' Council for the State of Alabama, an organization dedicated to the principles of white supremacy and prevention of integration of the white and Negro races. In 1951, Senator Engelhardt was the author of Act No. 606, which became law on September 4, 1951 (a copy of which [fol. 9] is attached hereto as plaintiffs' Exhibit No. 3, and made a part of this Complaint). This Act prohibited "single-shot" voting in elections where more than one place was to be filled, thereby preventing Negroes in the City of Tuskegee from guaranteeing the election of one member of the City Commission by use of the "single-shot" vote.

During the week of May 12, 1957, State Senator Engelhardt published a copy of the local bill, which was later passed as Act No. 140, in the Tuskegee News, a weekly newspaper (attached hereto as plaintiffs' Exhibit No. 4, and made a part of this Complaint). The bill was made

known generally through a story, written by Bob Ingram, appearing in the Montgomery Advertiser on May 19, 1957 (attached hereto as plaintiffs' Exhibit No. 5, and made a part of this Complaint). The aforesaid newspaper article cited the "obvious" purpose of the bill, i.e., "to assure continued white control in Tuskegee City elections." According to the same newspaper article, "Engelhardt also disclosed he was contemplating a proposal to abolish Macon County entirely if it became apparent that Negroes might gain control of the ballot boxes." In December, 1957, Alabama voters approved Senator Engelhardt's constitutional amendment to permit the abolition of Macon County (a copy of the constitutional amendment is attached hereto as plaintiffs' Exhibit No. 6, and made a part of this Complaint; an article in Time Magazine, December 30, 1957, page 17 is attached hereto as plaintiffs' Exhibit No. 7 and made a part of this Complaint).

[fol. 10]

9.

Effect of Act No. 140

As a result of their exclusion from Tuskegee under Act No. 140, plaintiffs have been deprived of the services of City policemen to patrol the school-zoned areas during certain hours as well as of the benefits of general street improvement and the paving of a particular street before August, 1957, as promised by the City prior to the passage of Act No. 140—denials of property rights without due process of law and on account of their race and color in violation of the Fourteenth Amendment to the Constitution of the United States. As result of the rearing, rearranging, and re-defining of the boundaries of the City Tuskegee, Alabama pursuant to Act No. 140, the plaintiffs and the class which they represent are not eligible to vote in municipal elections of the City of Tuskegee, Alabama. Plaintiffs have suffered and are threatened with further deprivations of their property without having the right to vote in Tuskegee municipal elections as heretofore alleged.

10.

Effect of Act No. 140

Act No. 140 deprives plaintiffs on account of their race and color not only of their right to vote in the aforesaid elections but also of their rights to effective participation in Tuskegee's municipal affairs, i.e., their rights of free speech, press, and petition as residents and citizens of Tuskegee—all in violation of the due process and equal [fol. 11] protection clauses of the Fourteenth and Fifteenth Amendments to the Constitution of the United States.

Plaintiffs and those similarly situated are suffering irreparable injury to their rights to vote, to free speech, press, and petition, and to property by reason of the Act herein complained of. They have no plain, adequate or complete remedy to redress these wrongs other than by this suit for declaratory judgment and injunctive relief. Any other remedy would be attended by such uncertainties and delays as to deny substantive relief, would involve a multiplicity of suits, and would cause further irreparable injury, damage and inconvenience to plaintiffs and those similarly situated.

Wherefore, plaintiffs respectfully pray that, upon filing of this Complaint, as may appear proper and convenient to the Court will advance this cause or its docket and order a speedy hearing thereon according to law and upon such hearing:

(1) The Court issue a decree adjudging Act No. 140 of the 1957 Regular Session of the Alabama Legislature, as applied to the plaintiffs and class which they represent, in violation of the due process and equal protection clauses of the Fourteenth Amendment of the Constitution of the United States and in violation of the Fifteenth Amendment of the Constitution of the United States, and

(2) That the Court enter a preliminary injunction pending the final disposition of the case, restraining and enjoining the defendants and each of them, and their servants, agents and successors in office from enforcing or executing

[fol. 12] the aforesaid Act against plaintiffs and those similarly situated, and from denying plaintiffs and those similarly situated the right to vote in Tuskegee municipal elections, and to be recognized and treated in all respects as citizens of the City of Tuskegee, and

(3) That the Court enter a permanent injunction restraining and enjoining defendants and each of them, and their servants, agents and successors in office from enforcing or executing the aforesaid Act against plaintiffs and those similarly situated, and from denying plaintiffs and those similarly situated the right to vote in Tuskegee municipal elections, and to be recognized and treated in all respects as citizens of the City of Tuskegee, and

(4) That the Court allow plaintiffs their costs herein, and grant such further, other additional or alternative relief as may appear to the Court to be equitable and just in the premises.

Fred D. Gray, Attorney for the Plaintiffs.

Fred D. Gray, 113 Monroe Street, Montgomery, Alabama.

Duly sworn to by Kenneth L. Buford, jurat omitted in printing.

[fol. 13]

EXHIBIT NO. 1 TO COMPLAINT

Each Probate Judge, Sheriff, and the Clerk and Register of the Circuit Court is required by law to preserve this slip or pamphlet in a book kept in his office until the Act is published in permanent form.

Alabama Law.

(Regular Session, 1957.)

Act No. 140 S.291—Engelhardt

An Act.

To alter, re-arrange, and re-define the boundaries of the City of Tuskegee in Macon County.

Be It Enacted by the Legislature of Alabama:

Section 1. The boundaries of the City of Tuskegee in Macon County are hereby altered, re-arranged and re-defined so as to include within the corporate limits of said municipality all of the territory lying within the following described boundaries, and to exclude all territory lying outside such boundaries:

[fol. 14] Beginning at the Northwest Corner of Section 30, Township 17-N, Range 24-E in Macon County, Alabama; thence South 89 degrees 53 minutes East, 1160.3 feet; thence South 37 degrees 34 minutes East, 211.6 feet; thence South 53 degrees 57 minutes West, 545.4 feet; thence South 36 degrees 03 minutes East, 1190.0 feet; thence South 53 degrees 57 minutes West, 675.2 feet; thence South 36 degrees 19 minutes East, 743.4 feet; thence South 33 degrees 50 minutes East, 1597.4 feet; thence North 61 degrees 26 minutes East, 1122.8 feet; thence North 28 degrees 34 minutes West, 50.0 feet; thence North 59 degrees 11 minutes East, 1049.3 feet; thence South 30 degrees 48 minutes East, 50.0 feet; thence North 50 degrees 08 minutes East, 341.1 feet; thence North 47 degrees 08 minutes East, 1239.4 feet; thence South 42 degrees 51 minutes East, 300.0 feet; thence South 47 degrees 00 minutes West, 1199.5 feet; thence South 64 degrees 09 minutes East, 1422.0 feet; thence South 24 degrees 13 minutes East 488.7 feet; thence South 73 degrees 25 minutes West, 370.8 feet; thence North 79 degrees 25 minutes West, 2285.3 feet; thence South 61 degrees 26 minutes West, 1232.6 feet; thence South 41 degrees 03 minutes East 792.3 feet; thence South 12 degrees 03 minutes East, 842.2 feet; thence North 88 degrees 09 minutes East, 4403.6 feet; thence South 0 degrees 15 minutes West, 6008.2 feet; thence North 89 degrees 59 minutes West, 4140.2 feet; thence North 34 degrees 46 minutes West, 6668.7 feet; thence North 35 degrees 00 minutes West, 380.4 feet; thence North 16 degrees 55 minutes West, 377.2 feet; thence North 54 degrees 29 minutes East, 497.8 feet; thence North 35 degrees 02 minutes West,

717.5 feet; thence South 54 degrees 03 minutes West, 1241.9 feet; thence North 36 degrees 09 minutes West, 858.4 feet; thence North 44 degrees 28 minutes East [fol. 15] 452.2 feet; thence North 22 degrees 33 minutes East, 4305.9 feet; thence North 86 degrees 43 minutes East, 236.3 feet to the point of beginning.

Section 2. All laws or parts of laws which conflict with this Act are repealed.

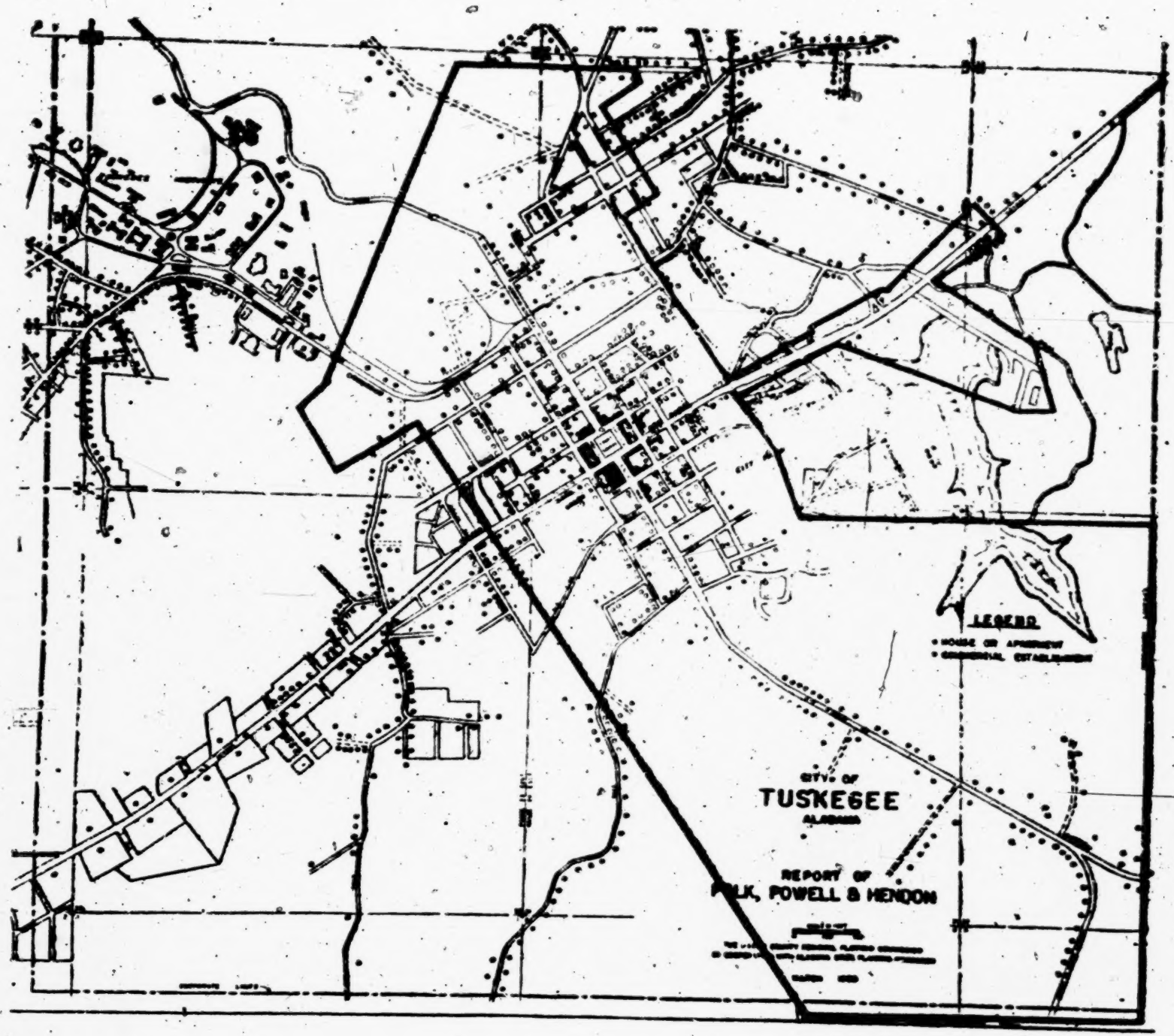
Section 3. This Act shall become effective immediately upon its passage and approval by the Governor, or upon its otherwise becoming a law.

This bill became an Act on July 15, 1957 without approval by the Governor.

I hereby certify that the foregoing copy of an Act of the Legislature of Alabama has been compared with the enrolled Act and it is a true and correct copy thereof.

Given under my hand this 15 day of July, 1957.

J. E. SPEIGHT,
Secretary of Senate.


LEGEND
CITY OF
TUSKEGEE
REPORT OF
FOLK, POWELL & HENDON

[fol. 17]

EXHIBIT No. 3 TO COMPLAINT

Alabama Law.

(Regular Session, 1957.)

Act No. 606 H. 722-Engelhardt

An Act.

Relating to elections; prohibiting single shot voting in municipal election; providing that when two (2) or more candidates are to be elected to the same office, the voter must express his choice for as many candidates as there are places to be filled.

Be It Enacted by the Legislature of Alabama:

Section 1. A ballot commonly known or referred to as "a single shot" shall not be counted in any municipal election. When two (2) more candidates are to be elected to the same office, the voter must express his choice for as many candidates as there are places to be filled and if he fails to do so, his ballot, so far as that particular office is concerned shall not be counted and recorded.

Section 2. All laws or parts of laws which conflict with this Act are repealed.

Section 3. This Act shall become effective immediately upon its passage and approval by the governor or upon its otherwise becoming a law.

Approved September 4, 1951.

Time: 11:18 A.M.

[fol. 18]

EXHIBIT NO. 7 TO COMPLAINT

Article In Time Magazine, December 30, 1957, Page 17.

How to Deny A Vote

In the opinion of Alabama's Racist State Senator Sam Engelhardt, Jr., if you can't lick 'em, the best thing to do is scatter 'em. Panicky because Negro vote strength was rising in his county seat of Tuskegee (population 6,700), Engelhardt last May authored a gerrymander that jig-sawed more than 400 Negro residents—and the respected Negro Tuskegee Institute—outside the city's limits. Forthwith, the city of Tuskegee was hard hit by a Negro boycott (Time, July 8) that slashed white merchants' business 50%, shut down stores that depended primarily on Negro trade. Incensed at the boycott, alarmed because Tuskegee-encompassing Macon County is 84% Negro, Senator Engelhardt, officer in the lily-white Alabama Association of Citizens' Councils, hatched a king-size gerrymander. Last week, by a 21,012 vote margin, Alabama voters approved his constitutional amendment to abolish Macon County.

Opposition to the Engelhardt proposal was strong, not because many Alabamans were suddenly reconciled to Negro voting, but because they agreed with the Birmingham News that "it leaves unanswered a number of questions as to division of tax moneys and the responsibilities for the areas of Macon which may be divided." Nonetheless, the Engelhardt plan can now run its course. Whenever they choose, commissioners of Macon County can meet [fol. 19] commissioners of abutting Tallapoosa, Elmore, Lee, Bullock and Montgomery Counties, apportion among the other five Macon County's 618 square miles. Then, when the legislature approves, Macon County will disappear.

EXHIBIT No. 4 TO COMPLAINT

(Newspaper Clipping.)

5-30-57 Tusk. News

Notice.

State of Alabama,
County of Macon.

Notice is hereby given that a bill substantially as follows will be introduced in the Legislature of Alabama and application for its passage and enactment will be made, to-wit:

A Bill to be Entitled an Act:

To alter, re-arrange, and re-define the boundaries of the City of Tuskegee in Macon County.

Be It Enacted by the Legislature of Alabama:

Section 1. The boundaries of the City of Tuskegee in Macon County are hereby altered, re-arranged and re-defined so as to include within the corporate limits of said municipality all of the territory lying within the following described boundaries, and to exclude all territory lying outside such boundaries:

Beginning at the Northwest Corner of Section 30, Township 17-N, Range 24-E in Macon County, Alabama: thence [fol. 20] South 89 degrees 53 minutes East, 1160.3 feet; thence South 37 degrees 34 minutes East, 211.6 feet; thence South 53 degrees 57 minutes West, 545.4 feet; thence South 36 degrees 03 minutes East, 1190.0 feet; thence South 53 degrees 57 minutes West, 675.2 feet; thence South 36 degrees 19 minutes East, 743.4 feet; thence South 33 degrees 50 minutes East, 1597.4 feet; thence North 61 degrees 26 minutes East, 1122.8 feet; thence North 28 degrees 34 minutes West, 50.0 feet; thence North 59 degrees 11 minutes East, 1049.3 feet; thence South 30 degrees 48 minutes East, 50.0 feet; thence North 50 degrees 08 minutes East, 341.1 feet; thence North 47 degrees 08 minutes East, 1239.4 feet; thence South 42 degrees 51 minutes East

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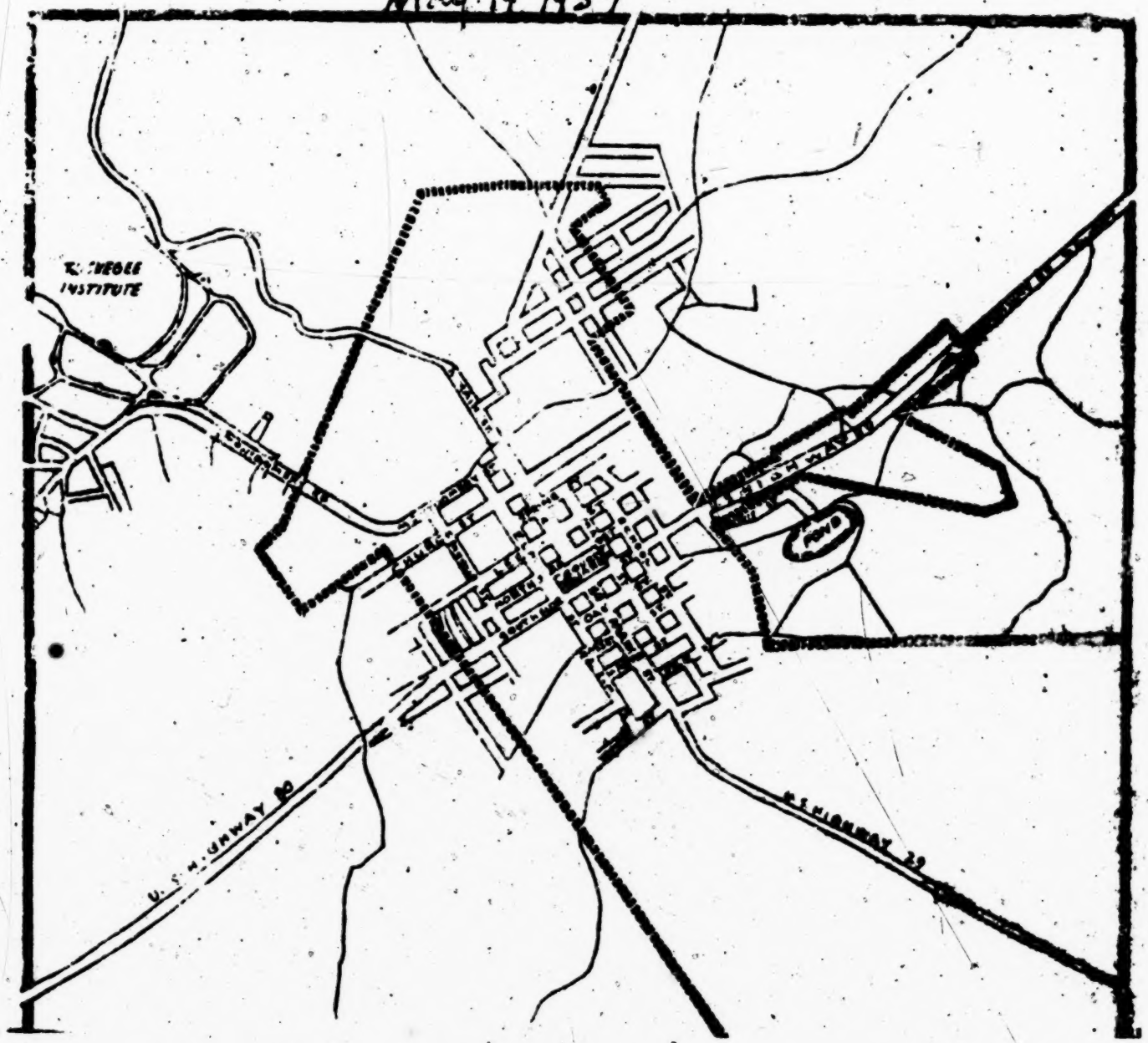
[fol. 21] S[illegible] All laws or parts * * * laws which conflict with * * * are repealed.

Section 3. This Act shall be * * * effective immediately upon its * * * sage and approval by the * * * or upon its otherwise * * * law.

(* * *—Printing of newspaper clipping torn at corner of original exhibit and therefore not legible.)

★ MONTGOMERY ADVERTISER-ALABAMA JOURNAL
May 19 1957



(Newspaper Clipping)

SUNDAY, MAY 19, 1957 Mtgy Adv. - Ala Jour

'MOVES' NEGROES

ENGELHARDT BILL
TO SHRINK CITY

[fol. 23]

EXHIBIT NO. 6 TO COMPLAINT

Constitutional Amendment Relative to Macon County.

"The Legislature may, with or without the notice prescribed by Section 106 of this Constitution, by a majority vote of each house, enact general or local laws altering or re-arranging the existing boundaries, or reducing the area of, or abolishing, Macon County, and transferring its territory, or any part thereof, and its jurisdiction and functions to contiguous counties. Toward this end, there shall be a committee composed of the senators and representatives who now represent the counties of Bullock, Elmore, Lee, Macon, Montgomery, and Tallapoosa in the Legislature to study and determine the feasibility of abolishing Macon County or reducing its area, and to formulate the legislation deemed necessary for such purpose. The committee shall select a chairman and a vice-chairman from among their number, shall meet on the call of the chairman, and shall report its findings, conclusions, and recommendations to the Legislative Council on or before the first Friday in October 1958; and the Legislative Council shall submit such report and any legislation proposed by the committee to the Legislature at the 1959 regular session thereof. The committee shall be discharged upon the filing of its report with the Legislative Council. Committee members shall be entitled to receive an amount equal to their regular legislative per diem and allowances for each day they serve, not to exceed fifty days altogether. The committee may employ such engineering, technical, clerical, and stenographic personnel as may be be necessary for the conduct of its work, and may fix their compensation. The compensation and expenses of the committee and its employees, and the other necessary [fol. 24] expenses incurred by the committee, shall be paid from any money in the state treasury not otherwise appropriated, on requisitions certified by the committee chairman; provided that the aggregate amount to be expended

by the committee shall not exceed the sum of fifty thousand dollars."

Passed the Senate August 23, 1957.

Passed the House September 13, 1957.

Approved by the Electors December, 1957.

IN UNITED STATES DISTRICT COURT

MOTIONS TO STRIKE—Filed August 25, 1958

I.

Come now the defendants, separately and severally, and move the Court to strike plaintiffs' compiaint filed herein on the grounds:

1. Said complaint is not in accordance with Rule 8(e) of the Federal Rules of Civil Procedure.

2. Said complaint contains matters and exhibits which are redundant.

3. Said complaint contains matters and exhibits which are impertinent.

[fol. 25] II.

Without waiving the foregoing Motions to Strike the entire Complaint, come now the defendants, separately and severally, and in the alternative, move the Court to strike from the plaintiffs' complaint that portion thereof under the subdivisions designated "8." and "9.", and Exhibits 3, 5, 6 and 7, and as grounds for said motion say:

1. Said matters and exhibits are redundant.

2. Said matters and exhibits are immaterial.

3. Said matters and exhibits are impertinent.

Harry D. Raymon (Harry D. Raymon), and Hill, Hill, Stovall & Carter, Thos. B. Hill, Jr., James J. Carter, Attorneys for Defendants.

Harry D. Raymon, Tuskegee, Alabama.

Hill, Hill, Stovall & Carter, Second Floor, Hill Building, P. O. Box 116, Montgomery, Alabama.

Certificate of Service (omitted in printing).

[fol. 26]

IN UNITED STATES DISTRICT COURT

MOTIONS TO DISMISS—Filed August 25, 1958

Come now the defendants, separately and severally, and move the Court as follows:

1. To dismiss the action because the complaint fails to state a claim against defendants upon which relief can be granted.

2. To dismiss the action for lack of jurisdiction.

3. To dismiss the action for that it affirmatively appears from the complaint that plaintiffs seek to have declared void a duly and lawfully enacted statute of the State of Alabama fixing and determining the corporate limits of a municipality.

4. To dismiss the action for that the fixing of boundaries of municipal corporations is a matter for the State Legislature acting in accordance with the State Constitution.

[fol. 27] 5. To dismiss the action for that a State may at its pleasure expand or contract the territorial area of a municipal corporation.

6. To dismiss the action for that plaintiffs seek to have the Court strike down a statute of the State of Alabama fixing and defining the corporate limits of the City of Tuskegee, Alabama, and as to boundaries of municipal corporations the State is supreme, and its Legislative body conforming its action to the State Constitution, may do as it will, unrestrained by any provision of the Constitution of the United States.

7. To dismiss the action for that plaintiffs seek to have this Court strike down a statute of the State of Alabama fixing and defining the territorial limits of a municipal corporation, and to have the Court establish new boundaries for the municipal corporation, and this Court is without jurisdiction to do so.

8. To dismiss the action for that the power is in the State alone to fix and determine boundaries of municipal corporations.

9. To dismiss the action for that the Courts have no power to determine the wisdom or policy of the Legislature which acting in accordance with the State Constitution fixes and determines the boundaries of a municipal corporation, a political subdivision of the State created by the State as a convenient agency for exercising such powers of the state in and over such limited territory as the State alone may determine.

10. To dismiss the action for that the number, nature, and duration of the powers conferred upon a municipal [fol. 28] corporation and the territory over which they shall be exercised rests in the absolute discretion of the State.

11. To dismiss the action for that the action in effect is against the State of Alabama and the State is immune to suit.

Harry D. Raymon (Harry D. Raymon), and Hill, Hill, Stovall & Carter, Thos. B. Hill, Jr., James J. Carter, Attorneys for Defendants.

Harry D. Raymon, Tuskegee, Alabama.

Hill, Hill, Stovall & Carter, Second Floor, Hill Building, P. O. Box 116, Montgomery, Alabama.

Certificate of Service (omitted in printing).

[fol. 29]

IN UNITED STATES DISTRICT COURT

MEMORANDUM OPINION—October 28, 1958

This is an action brought by the plaintiffs, and the class they represent, against the defendants, who are officials of the municipality of Tuskegee, Alabama, members of the Board of Revenue of Macon County, Alabama, and officials of Macon County, Alabama, in which county the municipality of Tuskegee is located. The action seeks a declaratory judgment, rendering invalid Act No. 140 enacted by the Legislature of the State of Alabama during its 1957 Regular Session. Plaintiffs allege that said Act is invalid in that it is, as to them and the class they represent, in violation of the due process and equal protection clauses of the Fourteenth Amendment of the United States Constitution and also in violation of the Fifteenth Amendment of the Constitution of the United States. Plaintiffs also seek to have this Court enjoin the above-named defendants in their official capacity from enforcing and executing the Act as to them and those that are similarly situated.

The matter is now submitted to the Court upon the motion of the defendants seeking to have this Court dismiss the complaint. This motion to dismiss raises the issues that the complaint fails to state a claim against these defendants upon which relief can be granted and lack of jurisdiction insofar as this Court is concerned. More specifically, in their motion to dismiss, these defendants state that this Court, and any other Court, does not have the authority or [fol. 30] jurisdiction to declare void a duly and lawfully enacted statute of the State of Alabama fixing and determining the corporate limits of a municipality. The defendants argue that the fixing of boundaries of a municipal corporation in the State of Alabama is a matter for the Legislature of the State of Alabama, acting in accordance with the State Constitution and is not, in instances such as this, subject to the jurisdiction, the control, or the supervision of the Federal Courts. The defendants argue, further, that it is outside the jurisdiction of the Federal Courts to ascertain or inquire into, to question or determine the

wisdom or the policy of the Legislature of the State of Alabama in fixing and determining the boundaries of a municipal corporation in this State.

The matter is also submitted upon the motion of these defendants seeking to have this Court strike plaintiffs' complaint upon the ground that the complaint is not in accordance with Rule 8(e) of the Federal Rules of Civil Procedure. In this motion, defendants state that the complaint contains matters that are redundant, immaterial, and impertinent. Generally, the matters set out in the complaint, of which defendants complain in their motion to strike, relate to the motive or motives of the Legislature of the State of Alabama in passing the Act in question.

On July 15, 1957, the Legislature of the State of Alabama, in its Regular Session, passed Special Act No. 140. This Act is entitled, "An Act To alter, rearrange, and redefine the boundaries of the City of Tuskegee in Macon County." The Act then describes in detail the territory the Legislature intends to be included within the municipality [fol. 31] of Tuskegee, Alabama, and specifically excludes all territory lying outside such described boundaries. Prior to the passage of Act No. 140, the boundaries of the municipality of Tuskegee formed a square, and, according to the complaint the defendants seek to strike and dismiss, contained approximately 5,397 Negroes, of whom approximately 400 were qualified as voters in Tuskegee, and contained approximately 1310 white persons, of whom approximately 600 were qualified voters in said municipality. As the boundaries are redefined by said Act No. 140, the municipality of Tuskegee resembles a "sea dragon." The effect of the Act is to remove from the municipality of Tuskegee all but four or five of the qualified Negro voters and none of the qualified white voters. Plaintiffs state that said Act is but another device in a continuing attempt to disenfranchise Negro citizens not only of their right to vote in municipal elections and participate in municipal affairs, but also of their right of free speech and press, on account of their race and color.

In connection with defendants' motion to strike plaintiffs' complaint upon the ground that it violates Rule 8(e) of the Federal Rules of Civil Procedure, it is the opinion of

this Court that the question of whether a complaint or, for that matter, any pleading violates said rule is dependent upon the circumstances of the particular case. For one of the several recent cases upholding this proposition, see Atwood v. Humble Oil & Refining Company, 5th Cir., 1957, 243 F. 2d 835. In other words, as to what is a short and plain statement of claim, as to what constitutes redundant, immaterial, or impertinent matters within the meaning of this rule, depends upon the particular case involved. This Court [fol. 32] is of the opinion that in this case the complaint does not violate Rule 8(e) and that defendants' motion to strike should be overruled and denied.

In passing upon the merits of defendants' motion to dismiss, it is first necessary to determine by what authority the Alabama Legislature in this instance acted. In this connection it appears that subsection 18 of §.104 of the Constitution of Alabama of 1901 authorizes the Legislature of the State of Alabama to pass acts such as Act No. 140 passed at the 1957 Regular Session. That particular section of the Constitution of Alabama reads as follows:

"(18) Amending, confirming, or extending the charter of any private or municipal corporation, or remitting the forfeiture thereof; PROVIDED, THIS SHALL NOT PROHIBIT THE LEGISLATURE FROM ALTERING OR REARRANGING THE BOUNDARIES OF THE CITY, TOWN OR VILLAGE." (Emphasis supplied.)

The Supreme Court of the State of Alabama has the same authority insofar as the Constitution of the State of Alabama is concerned, that the Supreme Court of the United States has insofar as the Constitution of the United States is concerned. The authority of each Court in interpreting and passing upon questions arising out of the respective Constitutions is supreme. See Willys Motors v. Northwest Kaiser-Willys, 142 F. Supp. 469 and the cases cited therein. The Supreme Court of the State of Alabama has held that the above-quoted part of the Constitution of Alabama permits legislation by local law concerning the alteration or rearrangement of cities, towns, or villages [fol. 33] withouf regard to the general law on the subject. See City of Ensley v. Simpson, 166 Ala. 366, 52 So. 61, and State v. Gullatt, 210 Ala. 452, 98 So. 373. Thus, this

Court must and does now conclude that the Legislature of the State of Alabama had under the Constitution of the State of Alabama and the interpretation of that Constitution by the Supreme Court of the State of Alabama, the authority to pass the Act in question.

This Court must therefore now proceed to a determination of the question as to whether or not the legislature of a state, or the state acting through its duly elected legislature, may, within the limits of its authority and without any interference from the Federal Courts, when there is no restraint on said acts specifically made by the Federal Constitution, pass an act such as Act No. 140 of the 1957 Regular Session of the Legislature of the State of Alabama. To put the question more concisely, can the legislature of a state arbitrarily change the territorial limits of a municipality within the state? There is a considerable amount of general law on the subject. The principles are stated in 16 C.J.S., Constitutional Law, page 706, and 37 Am. Jur., Municipal Corporations, page 652. However it is not necessary for this Court to rely upon general propositions in deciding this particular question, since the Federal Courts have been faced with similar questions for many years. One of the earlier cases, and possibly the leading case on the subject, is Laramie County v. Albany County, et al., 1875, 92 U.S. 307. In that case the Supreme Court of the United States commenting upon the authority of the legislature to control political subdivisions within the state, said:

[fol. 34] "Counties, cities, and towns are municipal corporations, created by the authority of the legislature; and they derive all their powers from the source of their creation, except where the constitution of the State otherwise provides."

"Unless the Constitution otherwise provides, the legislature still has authority to amend the charter of such a corporation, enlarge or diminish its powers, extend or limit its boundaries, divide the same into two or more, consolidate two or more into one, overrule its action whenever it is deemed unwise, impolitic, or unjust, and even abolish the municipality altogether, in the legislative discretion. Cooley on Const., 2d ed., 192."

Further in the opinion the Court stated:

"Opposition is sometimes manifested; but it is everywhere acknowledged that the legislature possesses the power to divide counties and towns at their pleasure and to apportion the common property and the common burdens in such manner as to them may seem reasonable and equitable. (Cases cited.)"

Approximately four years later, the Supreme Court of the United States was faced with a similar question in the case of Mount Pleasant v. Beckwith, 1879, 100 U.S. 514. Again the Supreme Court recognized the authority of the State, acting through its duly elected and convened legislative body, when it stated:

"Counties, cities, and towns are municipal corporations created by the authority of the legislature, and they derive all their powers from the source of their creation, [fol. 35] except where the Constitution of the State otherwise provides."

"Corporations of the kind are composed of all the inhabitants of the territory included within the political organization, each individual being entitled to participate in its proceedings; but the powers of the organization may be modified or taken away at the mere will of the legislature, according to its own views of public convenience, and without any necessity for the consent of those composing the body politic."

"Powers of a defined character are usually granted to a municipal corporation, but that does not prevent the legislature from exercising unlimited control over their charters. It still has authority to amend their charters, enlarge or diminish their powers, extend or limit their boundaries, consolidate two or more into one, overrule their legislative action whenever it is deemed unwise, impolitic, or unjust, and even abolish them altogether, in the legislative discretion, and substitute in their place those which are different. Cooley Const. Lim., (4th ed.) 232."

Probably one of the most emphatic statements to come from the Supreme Court of the United States on this proposition is in the case of Hunter v. City of Pittsburgh, 1907, 207 U.S. 161, wherein the Court stated:

"We have nothing to do with the policy, wisdom, justice or fairness of the act under consideration; those questions are for the consideration of those to whom the State has [fol. 36] entrusted its legislative power, and their determination of them is not subject to review or criticism by this Court."

In the Hunter v. Pittsburgh case, the Court went on to state:

"We have nothing to do with the interpretation of the constitution of the State and the conformity of the enactment of the Assembly to that constitution; those questions are for the consideration of the Courts of the State, and their decision of them is final."

As to the allegations of the complaint concerning the motives of the Legislature of Alabama in passing the Act in question, the law is clear that the supremacy and absolute control as to the territorial boundaries of municipalities is vested in the legislative body of the State, regardless of the motive underlying the enactment. See Doyle v. Continental Ins. Co., 1876, 94 U.S. 535, wherein the Supreme Court stated:

"If the State has the power to do an act, its intention or the reason by which it is influenced in doing it cannot be inquired into."

"IF THE ACT DONE BY THE STATE IS LEGAL, IS NOT IN VIOLATION OF THE CONSTITUTION OR LAWS OF THE UNITED STATES, IT IS QUITE OUT OF THE POWER OF ANY COURT TO INQUIRE WHAT WAS THE INTENTION OF THOSE WHO ENACTED THE LAW." (Emphasis supplied.)

Only recently the Doyle case was cited with approval by a three-Judge District Court sitting in Alabama when that Court rendered its opinion in Shuttlesworth v. Birmingham Board of Education, D.C. Ala., 1958, 162 F. Supp. [fol. 37] 372. That Court, speaking through the Honorable Richard T. Rives, stated:

"In testing constitutionality 'we cannot undertake a search for motive.' 'If the State has the power to do an

act, its intention or the reason by which it is influenced in doing it cannot be inquired into.' Doyle v. Continental Insurance Co., 94 U.S. 535, 541, 24 L. Ed. 148. As there is no one corporate mind of the legislature, there is in reality no single motive. Motives vary from one individual member of the legislature to another. Each member is required to be bound by Oath or Affirmation to support this Constitution.' Constitution of the United States, Article VI, Clause 3. Courts must presume that legislators respect and abide by their oaths of office and that their motives are in support of the Constitution."

Thus this Court must now conclude that regardless of the motive of the Legislature of the State of Alabama and regardless of the effect of its actions, insofar as these plaintiffs' right to vote in the municipal elections is concerned, this Court has no authority to declare said Act invalid after measuring it by any yardstick made known by the Constitution of the United States. This Court has no control over, no supervision over, and no power to change any boundaries of municipal corporations fixed by a duly convened and elected legislative body, acting for the people in the State of Alabama.

For the foregoing reasons, the motion of the defendants to strike this complaint upon the ground that it violates Rule 8(e) of the Federal Rules of Civil Procedure will be [fol. 38] overruled and denied; the motion of the defendants to dismiss this action upon the grounds that the complaint fails to state a claim against these defendants upon which relief can be granted and that this Court does not have any authority or jurisdiction to declare void this particular duly enacted statute of the State of Alabama will be granted.

A formal judgment will be entered in conformity with this opinion.

Done, this the 28th day of October, 1958.

Frank M. Johnson, Jr., United States District Judge.

[fol. 39]

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA

EASTERN DIVISION

Civil Action No. 462-E

C. G. GOMILLION, CELIA B. CHAMBERS, ALMA R. CRAIG, FRANK H. BENTLEY, WILLIE D. BENTLEY, KENNETH L. BUFORD, WILLIAM J. WHITE, AUGUSTUS O. YOUNG, JR., NETTIE B. JONES, DETROIT LEE, DELIA D. SULLIVAN and LYNNWOOD T. DORSEY, on behalf of themselves and others similarly situated, Plaintiffs,

—vs.—

PHIL M. LIGHTFOOT, as Mayor of the City of Tuskegee, G. B. EDWARDS, JR., L. D. GREGORY, FRANK A. OSLIN, W. FOY THOMPSON and H. A. VAUGHAN, JR., as Members of the Tuskegee City Council; O. L. HODNETT, as Chief of Police of the City of Tuskegee, Alabama; E. C. LESLIE, CHARLES HUDDLESTON, J. T. DYSON, F. C. THOMPSON and VIRGIL GUTHRIE, as Members of the Board of Revenue of Macon County, Alabama; PRESTON HORNSBY, as Sheriff of Macon County, Alabama; WILLIAM VARNER, as Judge of Probate of Macon County, Alabama, City of Tuskegee, Ala., a municipal corp., Defendants.

JUDGMENT—October 31, 1958

The above-styled action was submitted to this Court upon the motion of the defendants seeking to have this Court strike the complaint in this action upon the ground that it violates Rule 8(e) of the Federal Rules of Civil Procedure, and also upon the motion of the defendants to dismiss this action upon the grounds that the complaint fails to state a claim against these defendants upon which relief can be [fol. 40] granted and for lack of jurisdiction insofar as this Court is concerned.

Upon consideration of the above motions and for the reasons set forth in the memorandum opinion filed in this cause on October 29, 1958, and for good cause shown, it is the Order, Judgment and Decree of this Court that the motion

SUNDAY, MAY 19, 1957 Mtgy Adv. - Ala Jour

'MOVES' NEGROES

ENGELHARDT BILL
TO SHRINK CITY

By Bob Ingram

State Sen. Sam Engelhardt of Macon, in another bid to maintain total segregation in his county, has prepared a bill for introduction in the Legislature designed to assure continued white control in Tuskegee city elections.

The local bill, advertised for the first time this past week in the weekly Tuskegee News, would so rearrange and alter the city limits of Tuskegee as to exclude practically all of the Negro families.

The bill obviously was conceived as a result of the heavy Negro registration in Tuskegee. Negroes have registered in such numbers in that city as to make it a distinct possibility that a member of their race could be elected to municipal office.

JUST 'LOCAL BILL'

Although no official records are available, it is emtimated that Negroes comprise from 35 to 40 per cent of the total vote in the city of Tuskegee.

While the purpose of the local bill is obvious, Neither Engelhardt nor Tuskegee Mayor Phil Lightfoot will discuss the measure.

"It is nothing but a local bill, affecting the city of Tuskegee only," Engelhardt declared. He would say no more.

Mayor Lightfoot indicated he was not too familiar with the measure.

"I frankly haven't even studied the bill, but we will take a closer look at it real soon," Lightfoot said. "I guess we will have to make a survey to see just what it does."

Actually a survey has already been made and it shows that the city limits of Tuskegee, now perfectly square in shape, will be so redefined as to look like the outline of a sea dragon.

Tuskegee Institute and the surrounding residential area heavily populated with Negroes will be removed entirely from the city limits. So will several other sections of the city where there are Negro residential areas.

One Tuskegee resident who made a thorough appraisal of the bill offered a brief observation:

"He slipped up a couple of places and left about 15 or 20 Negro families inside the city limits. I guess he wanted to be fair about it."

Engelhardt, head of the pro-segregation Alabama Assn. of Citizens Councils, earlier took steps toward lessening the chances of Negroes being elected to office in Tuskegee.

In 1951 he pushed through a bill prohibiting "single-shot" voting in elections where more than one place was to be filled. Had "single-shot" balloting been permitted Negroes in Tuskegee could have voted for but one condidate in City Commission races and in so doing all but guarantee the election of the person they favored.

However under the law passed in 1951 voters must vote for as many candidates as there are places to fill.

Only last week Engelhardt also disclosed he was contemplating a proposal to abolish Macon County entirely if it became apparent that Negroes might gain control of the ballot boxes.

of the defendants seeking to have this Court strike the complaint in this action upon the ground that it violates Rule 8(e) of the Federal Rules of Civil Procedure should be and the same is hereby overruled and denied.

It is the further Order, Judgment and Decree of this Court that the motion of the defendants seeking to have this Court dismiss this action upon the grounds that the complaint fails to state a claim against these defendants upon which relief can be granted and for lack of jurisdiction, insofar as this Court is concerned, should be and the same is hereby granted. It is Ordered that this action be and the same is hereby dismissed.

It is the further Order, Judgment and Decree of this Court that all court costs incurred in this proceeding should be and they are hereby taxed against the plaintiffs, for which execution may issue.

Done, this the 31st day of October, 1958.

Frank M. Johnson, Jr., United States District Judge.

[fol. 41]

IN UNITED STATES DISTRICT COURT

NOTICE OF APPEAL—Filed November 19, 1958

[Title omitted]

Notice is hereby given that C. G. Gomillion, Celia B. Chambers, Alma R. Craig, Frank H. Bentley, Willie D. Bentley, Kenneth L. Buford, William J. White, Augustus O. Young, ., Nettie B. Jones, Detroit Lee, Delia D. Sullivan and Lynwood T. Dorsey, plaintiffs above named hereby appeal to the Circuit Court of Appeals for the Fifth Circuit from the Judgment of this Court sustaining the defendants' [fol. 42] Motion to Dismiss and dismissing plaintiffs' Complaint entered on the 31st day of October, 1958, in favor of defendants and against said plaintiffs.

Fred D. Gray, Arthur D. Shores, Attorneys for Appellants.

Fred D. Gray, 113 Monroe St., Montgomery, Ala., Arthur D. Shores, 1630 Fourth Ave., N., Birmingham, Ala.

Certificate of Service (omitted in printing).

Cost Bond on Appeal (omitted in printing).

[fol. 44]

IN UNITED STATES DISTRICT COURT

DESIGNATION OF RECORD—Filed November 19, 1958

To the Clerk of the District Court of the United States for the Middle District of Alabama:

You are hereby requested to prepare, certify and transmit to the Clerk of the United States Circuit Court of Appeals for the Fifth Circuit, with reference to the Notice of Appeal heretofore filed by the plaintiffs in the above cause, a transcript of the record in the above cause, prepared and transmitted as required by law and by the rules of said Court, and to include in said transcript of record the following documents, or certified copies thereof, to-wit: (1) Complaint (2) Motion to Strike (3) Motion to Dismiss (4) Memorandum Opinion of the Court dated October 29, 1958 (5) Judgment Decree dismissing complaint and denying defendant's Motion to Strike and dated October 31, 1958, (6) Notice of Appeal, with dat. of filing the same (7) Appeal Bond (8) This Designation of Record.

Fred D. Gray, Arthur D. Shores, Attorneys for the Plaintiffs.

Fred D. Gray, 113 Monroe St., Montgomery, Alabama, Arthur D. Shores, 1630 Fourth Avenue North, Birmingham, Alabama.

[fol. 45] Certificate of Service (omitted in printing).

[fol. 46] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 47]

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

MINUTE ENTRY OF ARGUMENT AND SUBMISSION—May 19, 1959

(Omitted in printing.)

[fol. 48]

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 17589

C. G. GOMILLION, et al., Appellants,

—v.—

PHIL M. LIGHTFOOT, as Mayor of the City of Tuskegee, et al., Appellees.

Appeal from the United States District Court for the Middle District of Alabama.

OPINION—September 15, 1959.

Before: Jones, Brown and Wisdom, Circuit Judges.

JONES, Circuit Judge:

The Legislature of Alabama passed a statute which changed the boundaries of the City of Tuskegee in Macon County of that State. The boundary changes reduced the area of the municipality. The plaintiffs, appellants here, are Negroes. They brought a class suit in the District Court for the Middle District of Alabama against the Mayor, the [fol. 49] members of the City Council, and the Chief of Police of the City of Tuskegee, and the members of the Board of Revenue, the Sheriff, and the Judge of Probate of Macon County, and the City of Tuskegee, alleging that as a result of the realignment of the boundaries most of the Negroes who had formerly lived in the City and substantially all of the Negroes who had been qualified to vote in City elections would no longer reside within the City. No white person residing in the City as previously constituted was excluded from it by the Act. The named plaintiffs, Negroes who had resided within the City limits as they formerly existed but beyond those limits as they are redefined by the statute, for themselves and others of such class, assert in their complaint that they have been deprived

of police protection and street improvements, and have been denied the right to vote in municipal elections and participate in the municipal affairs of Tuskegee. It was averred that the purpose of the passage of the statute was to deny and deprive the plaintiffs of the right of franchise and other rights and privileges of citizenship of the City of Tuskegee.

By the prayer of the complaint the plaintiffs asked for a declaration that the Legislative Act, as applied to the plaintiffs, is in violation of the due process and equal protection clauses of the Fourteenth Amendment and of the Fifteenth Amendment. Temporary and permanent injunctions were sought to restrain the defendants from enforcing the statute as to the plaintiffs and those similarly situated, and from denying them the right to participate in municipal elections and to be recognized and treated as citizens of the [fol. 50] City of Tuskegee. The defendants filed a motion to dismiss upon the grounds, variously stated, that the courts of the United States cannot inquire into the purpose of enacting or interfere with the carrying out of State legislation fixing the boundaries of municipalities within the State; and that the suit was, in substance, one against the State of Alabama which these plaintiffs could not maintain. The district court granted the motion to dismiss and in its opinion discussed the questions presented, and thus stated its conclusions:

> "Thus this Court must now conclude that regardless of the motive of the Legislature of the State of Alabama and regardless of the effect of its actions, in so far as these plaintiffs' right to vote in the municipal elections is concerned, this Court has no authority to declare said Act invalid after measuring it by any yardstick made known by the Constitution of the United States. This Court has no control over, no supervision over, and no power to change any boundaries of municipal corporations fixed by a duly convened and elected legislative body, acting for the people in the State of Alabama."

The Court entered a judgment dismissing the action upon the ground that the complaint failed to state a claim against

the defendants upon which relief could be granted, and for lack of jurisdiction. From this judgment the plaintiffs have appealed.

A general statement of the powers of States over municipal corporations has been made in these words:

> "The creation of municipal corporations, and the conferring upon them of certain powers and subjecting [fol. 51] them to corresponding duties, does not deprive the legislature of the State of that general control over their citizens which was before possessed. It still has authority to amend their charters, enlarge or diminish their powers, extend or limit their boundaries, consolidate two or more into one, overrule their legislative action whenever it is deemed unwise, impolitic or unjust, or even abolish them altogether in the legislative discretion, and substitute those which are different. The rights and franchises of such a corporation, being granted for the purposes of government, can never become such vested rights as against the State that they cannot be taken away; nor does the charter constitute a contract in the sense of the constitutional provision which prohibits the obligation of contracts being violated. * * * Restraints on the legislative power of control must be found in the constitution of the State, or they must rest alone in the legislative discretion. If the legislative action in these cases operate injuriously to the municipalities or to individuals, the remedy is not with the courts. The courts have no power to interfere, and the people must be looked to, to right through the ballot-box all these wrongs." 1 Cooley's Constitutional Limitations, 8th Ed. 393 et seq.

To this rule Professor Cooley notes exceptions but none are here pertinent. A portion of the language above has been quoted with approval by the Supreme Court. *Mount Pleasant* v. *Beckwith*, 100 U.S. 514, 529, 25 L. Ed. 699. With fewer words it has been said:

> [fol. 52] "The power to create or establish municipal corporations, to enlarge or diminish their area, to reorganize their governments or to dissolve or abolish them altogether is a political function which rests solely

in the legislative branch of the government, and in the absence of constitutional restrictions, the power is practically unlimited." 37 Am. Jur. 626, Municipal Corporations, § 7.

In an often cited opinion the Supreme Court has thus pronounced governing principles:

"Municipal corporations are political subdivisions of the state, created as convenient agencies for exercising such of the governmental powers of the state as may be intrusted to them. For the purpose of executing these powers properly and efficiently they usually are given the power to acquire, hold, and manage personal and real property. The number, nature, and duration of the powers conferred upon these corporations and the territory over which they shall be exercised rests in the absolute discretion of the state. Neither their charters, nor any law conferring governmental powers, or vesting in them property to be used for governmental purposes, or authorizing them to hold or manage such property or exempting them from taxation upon it, constitutes a contract with the state within the meaning of the Federal Constitution. The state, therefore, at its pleasure, may modify or withdraw all such powers, may take without compensation such property, hold it itself, or vest it in other agencies, expand or contract the territorial area, unite the whole or a part of it with [fol. 53] another municipality, repeal the charter and destroy the corporation. All this may be done, conditionally or unconditionally, with or without the consent of the citizens, or even against their protest. In all these respects the state is supreme, and its legislative body, conforming its action to the state Constitution, may do as it will, unrestrained by any provision of the Constitution of the United States. Although the inhabitants and property owners may, by such changes, suffer inconvenience, and their property may be lessened in value by the burden of increased taxation, or for any other reason, they have no right, by contract or otherwise, in the unaltered or continued existence of the corporation or its powers, and there is nothing

in the Federal Constitution which protects them from these injurious consequences: The power is in the state, and those who legislate for the state are alone responsible for any unjust or oppressive exercise of it." *Hunter* v. *Pittsburgh*, 207 U.S. 161, 28 S. Ct. 40, 52 L. Ed. 151. See *Pawhuska* v. *Pawhuska Oil Co.*, 250 U.S. 394, 39 S. Ct. 526, 63 L. Ed. 1054; *City of Trenton* v. *New Jersey*, 262 U.S. 182, 43 S. Ct. 534, 67 L. Ed. 937, 29 A.L.R. 1471.

In a leading Florida case it is stated:

"The existence of the power [of a State legislature to establish, alter, extend, or contract municipal boundaries] is freely conceded. But is that power unlimited, and the exercise of it entirely beyond the reach of judicial review in any and all cases? The weight of authority in this country seems to answer this question in the affirmative, and to hold that the legisla- [fol. 54] tive power in this regard is practically plenary and unlimited, in the absence of express constitutional restriction thereof." *State ex rel. Davis* v. *City of Stuart*, 97 Fla. 69, 120 So. 335, 64 A.L.R. 1307.

It is a general rule that the "power of increase and diminution of municipal territory is plenary, inherent and discretionary in the Legislature, and, when duly exercised, cannot be revised by the courts." Cooley on Municipal Corporations 106 § 32. See 16 C.J.S. 706, Constitutional Law § 145; Cooley's Constitutional Limitations, *supra; State ex rel. Davis* v. *City of Stuart, supra.*

It is not claimed that any provision of the State Constitution is violated. The Alabama Constitution expressly recognizes the legislative power of "altering or enlarging the boundaries" of municipalities. Ala. Const. Sec. 104 (18); *Ensley* v. *Simpson*, 166 Ala. 366, 52 So. 61; *State* v. *Gullatt*, 210 Ala. 452, 98 So. 373. Should it be contended that a state constitutional question is presented, such contention should not be submitted, in the absence of diversity of citizenship, to Federal tribunals. We find no necessity to declare the rule that a state legislature may do as it will in altering municipal boundaries unrestrained by any provi-

sion of the Federal Constitution to be a rule without exception. We think this case does not present the exception. We need not say, for our purposes here, that there may not be cases where courts can properly inquire as to whether a statute fixing boundaries transcends constitutional limits. We think this is not such a case.

[fol. 55] Judicial interposition will be sustained where general obligation municipal bonds have been issued and thereafter a change in boundaries has diminished the extent and value of the property subject to tax liens for servicing the bond issue. In such a case the Federal Constitution prevents the contract obligation of the bonds from being impaired by the reduction of the security pledged for their payment. However, the statute contracting the area is not to be declared void. The City's area would be reduced but the City would have a continuing right and lie under a continuing duty to levy taxes upon the territory outside, but which was formerly within, its limits as well as upon its remaining area to provide revenue to meet the maturities of interest and principal on the bonds. *Mobile* v. *Watson*, 116 U. S. 289, 6 S. Ct. 398, 29 L. Ed. 620. Cf. *City of Sour Lake* v. *Branch*, 5th Cir. 1925, 6 F. 2d 355, cert. den. 269 U. S. 565, 46 S. Ct. 24, 70 L. Ed. 414; *Town of Oneida* v. *Pearson Hardwood Flooring Co.*, 169 Tenn. 449, 88 S. W. 2d 998; I Quindry, Bonds and Bondholders 744 § 529.

The members of a municipal corporation, its citizens, are those residing within the municipal boundaries. They and all of them, but none others, are entitled to the benefits, privileges and immunities and they are subject to the burdens and liabilities of the municipalities. Property within an incorporated city or town is subject to taxation by the corporation. So also, as has been observed, land excluded may be subjected to taxation by the municipality to prevent impairment of a contract obligation. Sojourners must comply with the City's police regulations. When a person re- [fol. 56] moves from a municipal corporation he loses his membership and the rights incident to such membership and this is no less true where the removal is involuntary and results from a change of boundaries than where the resident removes to another place. That this is so does not restrict the legislative power to alter municipal boundaries.

It is said by Mr. Justice Jackson, a "fundamental tenet of judicial review that not the wisdom or policy of legislation but only the power of the legislature, is a fit subject for consideration by the court." Jackson, Struggle for Judicial Supremacy 81. See *Hunter* v. *Pittsburgh*, *supra*. In the consideration of statutes the courts will refrain from making inquiry into the motives of the legislature, and will not be influenced by the opinions of any or all the members of the legislature, or of its committees or of any other person. 82 C.J.S. 745-746, Statutes § 354. It has recently been stated that "In testing constitutionality we cannot undertake a search for motive. If the State has the power to do an act, its intention or the reason by which it is influenced in doing it cannot be inquired into." *Shuttlesworth* v. *Birmingham Board of Education*, D.C.N.D. Ala. 1958, 162 F. Supp. 372, aff. 358 U. S. 101, 79 S. Ct. 221, 3 L.Ed. 2d 145. An attack was made in the Tennessee courts upon an act of the legislature of that State which altered the boundaries of the City of Nashville. The plaintiffs charged that, among other things, the boundaries were arbitrarily drawn with irregular lines and numerous angles which subjected plaintiffs' property to municipal taxation while excluding other property similarly situated in violation of the due process [fol. 57] constitutional provisions. It was alleged that the act was conceived and its passage procured for sinister motives for the purpose of assessing the property of the plaintiffs and excluding the property of others, and this was done pursuant to an agreement between the persons benefited and a few members of the legislature. In holding the allegations insufficient the court said:

> "That a bill is inspired by private persons for their own advantage and to the detriment of others is clearly not a sufficient reason for holding the law void, when passed. Nor can the courts annul a statute because the legislature passing it was imposed upon and misled by a few of its members in conjunction with interested third parties. If the act in question is unwise and oppressive, the bill may be remedied by repeal or amendment. The courts have nothing to do with the policy of legislation nor the motives with which it is made." *Williams* v. *City of Nashville*, 89 Tenn. 487, 15 S. W. 364.

In a case where an issue was presented not wholly dissimilar to that before us, an attack was made on the County Unit System of voting that prevails in Georgia. It was asserted, among other things, that the statute providing for the "System" was unconstitutional because it had the "present effect and purpose of preventing the Negro and organized labor and liberal elements of urban communities, including Fulton County, from having their votes effectively counted in primary elections." It was held by a Three-Judge District Court that the Federal Constitution does not take [fol. 58] from states the right to set up their own internal organizations and prescribe the manner of state elections. *South* v. *Peters*, D.C.N.D.Ga. 1950, 89 F. Supp. 672. The Supreme Court affirmed, although a dissenting opinion took the view that the statute abridged the right to vote on account of color in violation of the Fifteenth Amendment. *South* v. *Peters*, 339 U.S. 276, 70 S. Ct. 641, 94 L. Ed. 834, reh. den. 339 U. S. 959, 70 S. Ct. 980, 94 L. Ed. 1369.

The enactment by a state legislature of a statute creating, enlarging, diminishing or abolishing a municipal corporation is, as has been noted, a political function. It is a governmental act. *American Bemberg Corporation* v. *City of Elizabethton*, 180 Tenn. 373, 175 S. W. 2d 535. Hence it is an act of sovereignty performed under a power reserved by the Tenth Amendment, 81 C.J.S. 858, States § 2. This universally recognized sovereign power should not be restricted by prohibiting its exercise where, as an incidence of it, Negroes would be purposely excluded from the municipality and from participation in its affairs.

Our consideration of what we regard to be the applicable rules of law leads us to the conclusion that, in the absence of any racial or class discrimination appearing on the face of the statute, the courts will not hold an act, which decreases the area of a municipality by changing its boundaries, to be invalid as violative of the Fourteenth and Fifteenth Amendments to the United States Constitution, although it is alleged that the enactment was made for the [fol. 59] purpose, not appearing in the Act, and with the effect of excluding or removing Negroes from the City and depriving them of the privileges and benefits of municipal membership, including the right to vote in City elections.

Since we have reached this conclusion, it follows that the judgment of the district court must be AFFIRMED.

BROWN, Circuit Judge, Dissenting.

WISDOM, Circuit Judge, Concurring Specially.

BROWN, Circuit Judge, dissenting:

Feeling that this decision is wrong, I cannot presume to speak for the Court. But in sounding this respectful dissent from the action of my Brothers who are no less sensitive than I to the compelling obligations of the Constitution, I would suggest that the Court itself is troubled by this decision.

Does the Court really mean to apply the absolute of *Hunter* v. *Pittsburgh*, 207 U.S. 161? It is sweeping and unequivocal:

> "In all these respects the state is supreme, and its legislative body, conforming its action to the state Constitution, may do as it will, unrestrained by any provision of the Constitution of the United States."

[fol. 60] If this is the law, then why does not the opinion end with it? Why does the Court disavow any purpose to hold that it is a rule without exception?[1]

Does the Court really determine that the question of alteration of municipal boundaries is a "political" matter and hence beyond the scrutiny of the Judiciary? If it means this, then why does it emphasize time and again that the discriminatory purpose does not appear on the *face* of the Alabama Act? If it is a "political" matter beyond judicial scrutiny, then what difference does it make whether the

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[1] "We find no necessity to declare the rule that a state legislature may do as it will in altering municipal boundaries unrestrained by any provision of the Federal Constitution to be a rule without exception. We think this case does not present the exception. We need not say, for our purposes here, that there may not be cases where courts can propery inquire as to whether a statute fixing boundaries transcends constitutional limits. We think this is not such a case."

purpose is frankly stated or stealthfully concealed by artful sophistication?

Does the Court mean to recognize that where the purpose of the Act is patent on its face the constitutional guaranty or prohibition is then sufficient to invest the Judiciary with a power to so declare by an effective order? [fol. 61] If the Judiciary has the power to strike down what is plainly forbidden, what is there about the nature of the judicial process, traditional notions of separation of powers, or the doctrine of judicial abstention from "political" matters, that robs the Judiciary of its accustomed role of inquiry and ascertainment of legislative purpose?

I do not find the answers to these questions in the Court's opinion. I believe earnestly that analysis will demonstrate that satisfactory answers may not be found either to them, or to others suggested by them. Like analysis will show, I think, that the courts are open to hear and determine the serious charge here asserted.

I.

Unlike the inherent ambiguity of a phrase like "due process" or "equal protection" found in the immediately preceding Fourteenth Amendment, the 34 words comprising the Fifteenth Amendment are plain. Their command is clear:

> "The right of citizens of the United States to vote shall not be denied or abridged by the United States

As much is implied by the Court's statement:

> "The enactment by a state legislature of a statute creating, enlarging, diminishing or abolishing a municipal corporation is, as has been noted, a political function. It is a governmental act. American Bemberg Corporation v. City of Elizabethton, 180 Tenn. 373, 175 S.W.2d 535. Hence it is an act of sovereignty performed under a power reserved by the Tenth Amendment. 81 C.J.S. 858, States § 2. This universally recognized sovereign power should not be restricted by prohibiting its exercise where, as an incidence of it, Negroes would be purposely excluded from the municipality and from participation in its affairs."

The last sentence indicates that *purposeful* exclusion of Negroes has a "sovereign" or "political" immunity regardless of its patent or latent genesis.

or by any State on account of race, color, or previous condition of servitude."

The idea, implicit in the Court's opinion that being a "political" matter the sanction of the constitutional guaranty is to be found in the self-imposed sense of responsibility of the individual states—here Alabama—is a denial of history.

[fol. 62] "A few years experience satisfied the thoughtful men who had been the authors of the other two Amendment that, notwithstanding the restraints of those articles on the states, and the laws passed under the additional powers granted to Congress, these were inadequate for the protection of life, liberty and property, without which freedom to the slave was no boon. They were in all those states denied the right of suffrage. The laws were administered by the white man alone. It was urged that a race of men distinctively marked as was the negro, living in the midst of another and dominant race, could never be fully secured in their person and their property without the right of suffrage.

"Hence the 15th Amendment, which declares that 'the right of a citizen of the United States to vote shall not be denied or abridged by any state on account of race, color, or previous condition of servitude.' The negro having, by the 14th Amendment, been declared to be a citizen of the United States, is thus made a voter in every state of the Union.

"We repeat, then, in the light of this recapitulation of events, almost too recent to be called history, but which are familiar to us all; and on the most casual examination of the language of these amendments, no one can fail to be impressed with the one pervading purpose found in them all, lying at the foundation of each, and without which none of them would have been even suggested; we mean the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly made freemen and citizen from the oppression of those who had formerly ex-

[fol. 63] ercised unlimited dominion over him. It is true that only the 15th Amendment, in terms, mentions the negro by speaking of his color and his slavery. But it is just as true that each of the other articles was addressed to the grievances of that race, and designed to remedy them as the fifteenth." *The Butchers' Benevolent Ass'n* v. *The Crescent City Live-Stock Landing and Slaughter-House Co.* (Slaughter-House Cases), 1873, 83 U.S. (16 Wall.) 36, 71-72, 21 L.Ed. 394.

Tested in this light, these statements of the District Court are compelling indeed. As he declared, in dismissing Appellants' complaint,

"Prior to the passage of Act No. 140, the boundaries of the municipality of Tuskegee formed a square, and, according to the complaint * * * contained approximately 5,397 Negroes, of whom approximately 400 were qualified as voters in Tuskegee, and contained approximately 1,310 white persons, of whom approximately 600 were qualified voters in said municipality. As the boundaries are redefined by said Act No. 140, the municipality of Tuskegee resembles a 'sea dragon.' The effect of the Act is to remove from the municipality of Tuskegee all but four or five of the qualified Negro voters and none of the qualified white voters. Plaintiffs state that said Act is but another device in a continuing attempt to disenfranchise Negro citizens not only of their right to vote in municipal elections and participate in municipal affairs, but also of their right of free speech and press, on account of their race and color." *Gomil-* [fol. 64] *lion* v. *Lightfoot*, M.D.Ala., 1958, 167 F. Supp. 405, 407.

The conclusion and judgment of the District Court, which we have this day affirmed, is "that the complaint fails to state a claim * * * upon which relief can be granted and that this Court does not have any authority or jurisdiction to declare void this particular duly enacted statute of the

State of Alabama." 167 F.Supp. 465, 410. Accordingly, the case must now be measured against the allegations of the complaint which categorically charges purposeful discrimination for race. For, as we have learned from *Conley v. Gibson*, 1957, 355 U.S. 41, 45-46, 78 S.Ct. 99, 2 L.Ed.2d. 80, "In appraising the sufficiency of the complaint we follow, of course, the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to re- [fol. 65] lief." And for this purpose the complaint must be taken as true. *Glus v. Brooklyn Eastern District Terminal*, 1959, ... U.S. ....., ... S.Ct. ....., 3 L.Ed.2d 770, 774.

Considering the procedural context in which this case now finds itself, the Court has permitted the Legislature of Alabama to simply abolish a substantial part of one of its cities, Tuskegee, and thereby disenfranchise all but four or five of its Negro citizens. Almost as anticipating the existence of this invincible power, the legislature is perhaps presently considering using it to eradicate the entire County of Macon.[1]

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[1] The District Court puts it squarely on the basis that the "court does not have any authority or jurisdiction." Another thing still unclear in this Court's opinion is whether it takes a like view or whether, in the expression "the courts will *not hold* an act * * * to be invalid * * *" this Court is to be understood as recognizing that it has the power to review—and exercising it—affirmatively finds the act within the constitutional prerogative of Alabama. The Court expresses its conclusion this way:

> "Our consideration of what we regard to be the applicable rules of law leads us to the conclusion that, in the absence of any racial or class discrimination appearing on the face of the statute, the courts will not hold an act, which decreases the area of a municipality by changing its boundaries, to be invalid as violative of the Fourteenth and Fifteenth Amendments to the United States Constitution, although it is alleged that the enactment was made for the purpose, not appearing in the Act, and with the effect of excluding or removing Negroes from the City and depriving them of the privileges and benefits of municipal membership, including the right to vote in City elections."

[2] An amendment to the Alabama Constitution providing that the legislature "may * * * by a majority vote of each house, enact

II.

Although to me this is an apt illustration of "burn[ing] the house to roast the pig," I agree with much of that said by the Appellees, the District Judge and the majority of this Court. Zoning and districting regulations are primarily for states. Voting regulations are primarily for states. As a general rule, the Constitution of the United States, the Congress, the Federal Courts, and the Executive Branch of the Federal Government are not concerned with such local matters.

This is not to say, however, as the Court's opinion tends to conclude from the *Hunter*, *Beckwith* and *Laramie* cases,[*] [fol. 66] that the Constitution imposes *no* limitation upon the actions of the states in these areas.

It is axiomatic that in a federal system the laws of the individual states cannot be supreme. For even in a field reserved expressly to the States or to the people it is the Constitution which assures that. The Constitution so prescribes. Article Six of the Constitution provides that "This Constitution * * * shall be the supreme Law of the Land; * * * any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." Moreover, Alabama, like most states, requires that "All members of the legislature, and all officers, executive and judicial, before they enter upon the execution of the duties of their respective offices * * *" must swear to "support the Constitution of the United States * * *." Ala. Const. Art. 16, §279 (1901).

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general or local laws * * * reducing the area of, or abolishing, Macon County * * *" was introduced and passed by the 1957 session of the Alabama Legislature as Act No. 526. It was subsequently submitted to a referendum, and approved, December 17, 1957. The Act is reported at 3 Race Rel. L. Rep. 357 (1958).

[*] Butler v. Michigan, 1957, 352 U.S. 380, 383, 77 S.Ct. 524, 1 L.Ed.2d 412 (per Frankfurter, J.).

[*] Hunter v. Pittsburgh, 1907, 207 U.S. 161, S.Ct. , 52 L.Ed. 151; Mount Pleasant v. Beckwith, 1880, 100 U.S. 514, S.Ct. , 35 L.Ed. 699; Comm'rs of Laramie County v. Comm'rs of Albany County, 1876, 92 U.S. 307, S.Ct. , 23 L.Ed. 552. 167 F.Supp. 405, 408-409.

The nearly 360 volumes of the United States Reports are full of the historical story of the occasional conflict between what are in all other respects matters of wholly local concern, and some provision of the Constitution. Needless to say, whenever true conflict has in fact existed, the Constitution has always won out. There is no local matter which is not subject to potential examination for Constitutional defects. To list them all is the task of a case digest or encyclopedia, not a judicial opinion. But a few examples are helpful to illustrate the broad spectrum of constitutional concern.

[fol. 67] A mere cursory examination of the following areas will show that they are all typically thought of as matters of nearly exclusive local control. And yet the footnotes indicate some of the familiar cases in which it was determined that, for some reason, the state or local government's treatment was weighed and found constitutionally wanting: local education,[7] transportation,[8] and recreation facilities; athletic contests control;[9] local housing develop-

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[7] Cooper v. Aaron, 1958, U.S. , S.Ct. , 3 L.Ed. 2d 3, 5, 17 (Little Rock); Brown v. Board of Education, 1954, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873, Amplg 98 L.Ed. 882, 38 A.L.R. 2d 1180; supplemental opinion, 1955, 349 U.S. 294, 75 S.Ct. 753, 99 L.Ed. 1083; also companion case Bolling v. Sharpe, 1954, 347 U.S. 497, 74 S.Ct. 693, 98 L.Ed. 884 (the original "school segregation cases").

[8] Gayle v. Browder, 1956, 352 U.S. 903, 77 S.Ct. 145, 1 L.Ed.2d 114, affirming per curiam, M.D.Ala., 1956, 142 F.Supp. 707 (Montgomery busses).

[9] Beal v. Holcombe, 5 Cir., 1951, 193 F.2d 384, cert. denied, 1954, 347 U.S. 974, 74 S.Ct. 783, 98 L.Ed. 1114 (golf course); City of Ft. Lauderdale v. Moorehead, 5 Cir., 1957, 248 F.2d 544, affirming per curiam, S.D.Fla., 1957, 152 F.Supp. 131 (same); New Orleans City Park Improvement Assn. v. Detiege, 5 Cir., 1958, 252 F.2d 122 (park); Kansas City v. Williams, 8 Cir., 1953, 205 F.2d 47, affirming, W.D.Mo., 1952, 104 F.Supp. 848, cert. denied, 1953, 346 U.S. 826, 74 S.Ct. 45, 98 L.Ed. 351 (swimming pool).

[10] State Athletic Comm. v. Dorsey, 1959, U.S. , S.Ct. , L.Ed.2d [May 25, 1959, 27 L.W. 3337], affirming per curiam, E.D.La., 1959, F.Supp. [Judge Wisdom, 27 L.W. 2289] (statute barring interracial athletic contests).

ments;[17] state taxation[18] and educational institutions;[19] what are essentially state judicial procedure matters like admis- [fol. 68] sion to the state bar,[20] appointment of counsel,[21] enforcement of restrictive covenants,[22] payment of filing fees[23] and furnishing of transcripts[24] for appeal, and the selection of jurors;[25] and even a governor's control of his state's militia,[26] and control of highway safety.[27]

One would be hard pressed to find an area of "exclusive state action" which has or could not, in some way, by legislative design or administrative execution, be found to be violative of some constitutional provision. This has nothing to do with the occasional strife surrounding overlapping congressional and state legislation. No one here contends that Congress has the right to redistrict Tuskegee

[17] Banks v. Housing Authority of San Francisco, 120 Cal. App.2d 1, 260 P.2d 668, cert. denied, 1954, 347 U.S. 974, 74 S.Ct. 784, 98 L.Ed. 1114 (public low rent housing).

[18] Spector Motor Service, Inc. v. O'Connor, 1951, 340 U.S. 602, S.Ct. , 95 L.Ed. 573.

[19] Sweatt v. Painter, 1950, 339 U.S. 629, 70 S.Ct. 848, 94 L.Ed. 1114 (law school); Missouri ex rel. Gaines v. Canada, 305 U.S. 337, 59 S.Ct. 232, 83 L.Ed. 208 (same).

[20] Konigsberg v. State Bar of California, 1957, 353 U.S. 252, 77 S.Ct. 722, 1 L.Ed.2d 810; Schware v. Board of Bar Examiners, 1957, 353 U.S. 232, 77 S.Ct. 752, 1 L.Ed.2d 796.

[21] Powell v. Alabama, 1932, 287 U.S. 45, S.Ct. , 77 L.Ed. 158.

[22] Barrows v. Jackson, 1953, 346 U.S. 249, 73 S.Ct. 1031, 97 L.Ed. 1586, Annot. 97 L.Ed. 1602; Shelly v. Kraemer, 1948, 334 U.S. 1, 68 S.Ct. 836, 92 L.Ed. 1161; 3 A.L.R.2d 441.

[23] Burns v. Ohio, 1959, U.S. , S.Ct. , 3 L.Ed.2d [June 15, 1959].

[24] Griffin v. Illinois, 1956, 351 U.S. 12, 76 S.Ct. 585, 100 L.Ed. 891.

[25] Cassell v. Texas, 1950, 339 U.S. 282, S.Ct. , 94 L.Ed. 839; Smith v. Texas, 1940, 311 U.S. 128, S.Ct. , 85 L.Ed. 84; United States ex rel. Goldsby v. Harpole, 3 Cir., 1959, 263 F.2d 71.

[26] Sterling v. Constatin, 1932, 287 U.S. 378, S.Ct. , 77 L.Ed. 375; and see Cooper v. Aaron, note 7, supra.

[27] Bibb v. Navajo Freight Lines, 1959, U.S. , 79 S.Ct. , 3 L.Ed.2d 1003 (truck mud guard regulations).

or prescribe the qualifications for voting in its municipal elections. But the fact that these are solely, or primarily, the initial concerns of Alabama, one does not mean that when it acts it may act without regard for the Constitution. [fol. 69] The Supreme Court expressed the standard in *Cooper* v. *Aaron*, note 7, *supra*, when they said,

> "It is, of course, quite true that the responsibility for public education is primarily the concern of the States, but it is equally true that such responsibilities, *like all other state activity*, must be exercised consistently with federal constitutional requirements as they apply to state action." (Emphasis supplied.) 358 U.S. ..... at ..... [3 L.Ed.2d 5 at 17].

Of course, the same thing could be said of state regulation of voting and zoning.

In *Sterling* v. *Constantin*, note 20, *supra*, the Supreme Court was confronted with the contention that,

> "* * * th Governor's order had the quality of a supreme and unchallengeable edict, overriding all conflicting rights of property and unreviewable through the judicial power of the Federal Government." 287 U.S. 378 at 397.

A contention, it might be noted, which is not altogether dissimilar from that advanced here as to the omnipotence of the Alabama legislature. The assertion was quickly disposed of by the Court in the very next sentence.

> "If this extreme position could be deemed to be well taken, it is manifest that the fiat of a state Governor, and not the Constitution of the United States, would be the supreme law of the land; that the restrictions of the Federal Constitution upon the exercise of state [fol. 70] power would be but impotent phrases, * * *." Id., at 397-98.

III.

Nothing in the *Hunter*, *Beckwith* and *Laramie* municipal redistricting cases, note 6, *supra*, primarily relied upon by the majority and the District Court, alters this view.

Indeed, in those very cases the Supreme Court acknowledged that *some* limitations were to be imposed upon the state's action.

> "Text writers concede *almost* unlimited power to the State Legislatures in respect to the division of towns and the alteration of their boundaries, but they all agree that in the exercise of these powers they cannot defeat the rights of creditors nor impair the obligation of a valid contract. [Citations.]
>
> "Concessions of power to municipal corporations are of high importance; but they are not contracts, and, consequently, are subject to legislative control without limitation, *unless the Legislature oversteps the limits of the Constitution.*" (Emphasis supplied.) *Mount Pleasant v. Beckwith*, note 6, *supra*, 100 U.S. 514, 533.

Moreover, they are not recent cases. Only one was decided in the Twentieth Century, and that over 50 years ago. Racial discrimination was in no way involved. The problems involved concerned property higher taxes for the an- [fol. 71] nexed city (Hunter), and the liability of a newly created county for the extinguished county's debts (Beckwith and Laramie). Extravagant dicta, taken out of its property context, that "the state is supreme, and its legislative body, conforming its action to the state Constitution, may do as it will, unrestrained by any provision of the Constitution of the United States"[22] should not now be spread, some 52 years later, to cover and control our determination of issues of a different area, and of another era.[23]

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[22] Hunter v. Pittsburgh, note 6, supra, 207 U.S. 161, 179.

[23] I make no apologies for the view that the business of judging in constitutional fields is one of searching for the spirit of the Constitution in terms of the present as well as the past, not the past alone. I find respectable authority in the words of Chief Justice Hughes in Home Building & Loan Association v. Blaisdell, 290 U.S. 398, 442, ___ S.Ct. ___, 78 L.Ed. 413:

> "It is no answer to say that this public need was not apprehended a century ago, or to insist that what the provision of the Constitution meant to the vision of that day it must mean

[fol. 72] IV.

Of course it is true that there are many and varied areas of potential controversy which the courts have held to be, for one reason or another, beyond the limits of judicial relief. These include, for example, the constitutional "guarantee to every State in this Union a Republican Form of Government" [24] (Art. IV, § 4), the congressional regulation of Indian tribes,[25] the legislative and executive control of foreign relations, recognition of foreign governments, and the war powers,[26] control of civilian and military

to the vision of our time. If by the statement that what the Constitution meant at the time of its adoption it means today, it is intended to say that the great clauses of the Constitution must be confined to the interpretation which the framers, with the conditions and outlook of their time, would have placed upon them, the statement carries its own refutation. It was to guard against such a narrow conception that Chief Justice Marshall uttered the memorable warning—'We must never forget that it is *a Constitution* we are expounding' (McCulloch v. Maryland, 4 Wheat. 316, 407)—'A Constitution intended for ages to come, and consequently, to be adapted to the various crises of human affairs.' * * *. When we are dealing with the words of the Constitution, said this Court in Missouri v. Holland, 252 U.S. 416, 433, 'We must realize that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters * * *.' The case before us must be considered in the light of our whole experience and not merely in that of what was said a hundred years ago."

[24] Pacific States Telephone & Telegraph Co. v. Oregon, 1912, 223 U.S. 118, [illegible] S.Ct. [illegible], 56 L.Ed. 377; Taylor v. Beckham, 1900, 178 U.S. 548, [illegible] S.Ct. [illegible], 44 L.Ed. 1187, Luther v. Borden, 1849, 48 U.S. (7 How.) 1, 42, 12 L.Ed. 581.

[25] Lone Wolf v. Hitchcock, 1903, 187 U.S. 553, 565, [illegible] S.Ct. [illegible], 47 L.Ed. 299.

[26] Harisiades v. Shaughnessy, 1952, 342 U.S. 580, 588-89, 72 S.Ct. 512, 96 L.Ed. 586; Hirabayashi v. United States, 1943, 320 U.S. 81, 93, [illegible] S.Ct. [illegible], 87 L.Ed. 1774; United States v. Curtiss-Wright Export Corp., 1936, 299 U.S. 304, [illegible] S.Ct. [illegible], 81 L.Ed. 255; Oetjen v. Central Leather Co., 1918, 246 U.S. 297, 302, [illegible] S.Ct. [illegible], 62 L.Ed. 726; Neely v. Henkel, 1901, 180 U.S. 109, [illegible] S.Ct. [illegible], 45 L.Ed. 448; Kennett v. Chambers, 1852, 55 U.S. (14 How.) 38, 50-51, 14 L.Ed. 316.

appointing power,[27] or for that matter, the inherent *wisdom* of any executive or legislative policy or specific action,[28] as, for example, taxation.[29]

An outstanding illustration is the Supreme Court's traditional reluctance to grant taxpayers relief against [fol. 73] governmental action. As that Court declared in *Massachusetts* v. *Mellon*, 1923, 262 U.S. 447, 487, 488 ..... S.Ct. ....., 67 L.Ed. 1078, regarding a citizen's attack upon a federal appropriation bill,

> "His interest in the moneys of the Treasury * * * is shares with millions of others * * *. * * * If one taxpayer may champion and litigate such a cause, then every other taxpayer may do the same, not only in respect to the statute here under review, but also in respect of every other appropriation act and statute whose administration requires the outlay of public money, and whose validity may be questioned. The bare suggestion of such a result, with its attendant inconveniences, goes far to sustain the conclusion which we have reached, that a suit of this character cannot be maintained. * * * The party who invokes the power [of courts to declare acts unconstitutional] must be able to show not only that the statute is invalid, but that he * * * is immediately in danger of sustaining some direct injury as the result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally."

Such reasoning is hardly applicable here. Appellants' complaint is not one "in common with people generally" —only those whose skin is black. And their suffering is not indefinite: one day voting citizens of Tuskegee, the next they have been deprived of both vote and village.

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[27] Orloff v. Willoughby, 1953, 345 U.S. 83, 90, 73 S.Ct. 534, 97 L.Ed. 842.

[28] Trop v. Dulles, 1958, 356 U.S. 86, 114, 120, 78 S.Ct. 590, 2 L.Ed.2d 630 (dissenting opinion).

[29] Massachusetts v. Mellon, 1923, 262 U.S. 447, 487-88, S.Ct. , 67 L.Ed. 1078.

[fol. 74] Nor do the two voter cases applying judicial abstention because the cases were political in nature either justify or compel a different result.

In *Colegrove* v. *Green*, 1946, 328 U.S. 549, ... S.Ct. ....., 90 L.Ed. 1432, Illinois citizens sought a redistricting of the state because of the gross inequality inherent in a range of population in congressional districts of from 112,116 to 914,000. The Court affirmed the dismissal of the complaint "because due regard for the effective working of our Government revealed this issue to be of a peculiarly political nature, and therefore not meet for judicial determination." 328 U.S. 549, 552. Again, however, this case involved no consideration of racial issues. The conflict was between rural and urban Illinois, or political parties, not races. And, although some citizens only had one-ninth the vote of others, they were all still permitted to engage in the formality of balloting. It may also be noted that this was not a determination that the districting was constitutional, that the three dissenters felt that the Court should have decided the case, and against the constitutionality of the districting complained of, that Mr. Justice Rutledge's concurring opinion expressed the view that the Court has the power to provide relief in such cases but that here "the cure sought may be worse than the disease," 328 U.S. 549, 566, and that the opinion has come under some criticism. See, e.g., Lewis Legislative Apportionment and the Federal Courts, 71 Harv. L.Rev. 1057 (1958).

A case of disenfranchisement of Negroes by redistricting has apparently never before arisen. But, as I shall [fol. 75] point out in detail, the right of Negroes to vote equally with whites has been jealously guarded by the Supreme Court.

Even in *Breedlove* v. *Suttles*, 1937, 302 U.S. 277, ... S.Ct. ....., 82 L.Ed. 252, in which the Court found that Georgia's poll tax did not deny any privilege or immunity of the 14th Amendment, the opinion notes that the otherwise complete freedom of a state to "condition suffrage as it deems appropriate" is "restrained by the Fifteenth and Nineteenth Amendments and other provisions of the Federal Constitution * * *." 302 U.S. 277, 283.

And although the brief per curiam in *South* v. *Peters*, 1950, 339 U.S. 276, ... S.Ct. ....., 94 L.Ed. 834, affirming the dismissal of a petition attacking Georgia's county unit voting system for primary elections as violative of the Fourteenth and Seventeenth Amendments, harks back to *Colegrove* v. *Green, supra*, and the categorization of "cases posing political issues arising from a state's geographical distribution of electoral strength among its political subdivisions," 339 U.S. 276, 277, it too, does not completely disenfranchise any citizen, is primarily concerned with the urban-rural conflict, and carries a strong dissent, that begins by acknowledging for all, "I suppose that if a State reduced the vote of Negroes, Catholics, or Jews so that each got only one-tenth of a vote, we would strike the law down."

[fol. 76]

V.

When a racial discrimination voting issue is clearly posed the Court has evidenced little concern for judicial abstention in "cases posing political issues." Mr. Justice Holmes provided this frontal attack for the Court in the "white primary case" of *Nixon* v. *Herndon*, 1927, 273 U. S. 536, 540, 541, ... S.Ct. ....., 71 L.Ed. 759 "The objection that the subject-matter of the suit is political is little more than a play upon words. Of course, the petition concerns political action, but it alleges and seeks to recover for private damage. That private damage may be caused by such political action, and may be recovered for in a suit at law, hardly has been doubted for over two hundred years * * *. * * * States may do a good deal of classifying that it is difficult to believe rational, but there are limits, and it is too clear for extended argument that color cannot be made the basis of a statutory classification affecting the right set up in this case." In *Smith* v. *Allwright*, 1944, 321 U.S. 649, ... S.Ct. ....., 88 L.Ed. 987, the Court acknowledged that, "Texas is free to conduct her elections and limit her electorate as she may deem wise, save only as her action may be affected by the prohibitions of the United States Constitution * * *." 321 U.S. 649, 657, and then went on to note that, "the Fifteenth Amendment specifically interdicts any denial or abridgement by a state

of the right of citizens to vote on account of color," (Id.) and found the Texas white primary procedure unconstitutional. Its teaching was applied to strike down the Jaybird Association in *Terry* v. *Adams*, 345 U.S. 461, 73 S.Ct. 809, 97 L.Ed. 1152. Mr. Justice Black reviewed many [fol. 77] of the predecessor cases, took note of the fact that the Fifteenth Amendment has been held "self-executing" and declared:

> "The Amendment bans racial discrimination in voting by both state and nation. It thus establishes a national policy, obviously applicable to the right of Negroes not to be discriminated against as voters in elections to determine public governmental policies or to select public officials, national, state, or local." 345 U.S. at 467.

Not only have the courts uniformly enforced Negro voting rights under the Constitution, but Congress pursuant to the constitutional mandate has for nearly 100 years specifically provided for judicial enforcement of civil rights by legislation.[30] See, e.g., 18 U.S.C.A. §§ 241-

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[30] 18 U.S.C.A. §241:

> "If two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having exercised the same; or
>
> "If two or more persons go in disguise on the highway, or on the premises of another, with intent to prevent or hinder his free exercise of enjoyment of any right or privilege so secured—
>
> "They shall be fined not more than $5,000 or imprisoned not more than ten years, or both."

18 U.S.C.A. §242:

> "Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects any inhabitant of any State, Territory, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States, or to different punishments, pains, or penalties, on account of such inhabitant being an alien, or by reason of his color, or race, than are prescribed

[fol. 78] 243, 28 U.S.C.A. §§ 1343, 1443, 42 U.S.C.A. §§ 1981 1995.

[fol. 79] It is of little significance that the Alabama Tuskegee redistricting act under consideration does not, as this Court so greatly emphasizes, demonstrate on its face that is directed at the Negro citizens of that community. If the act is discriminatory in purpose and effect, "whether accomplished ingeniously or ingenuously [it] cannot stand."

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for the punishment of citizens, shall be fined not more than $1,000 or imprisoned not more than one year, or both." 18 U.S.C.A. §243:

Providing that there shall be no discrimination in the selection of jurors and setting a $5,000 fine for violation.

28 U.S.C.A. §1343:

"The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

"(1) To recover damages for injury to his person or property, or because of the deprivation of any right or privilege of a citizen of the United States, by any act done in furtherance of any conspiracy mentioned in section 1985 of Title 42;

"(2) To recover damages from any person who fails to prevent or to aid in preventing any wrongs mentioned in section 1985 of Title 42 which he had knowledge were about to occur and power to prevent;

"(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

"(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, *including the right to vote.*" (emphasis supplied)

Part (4) added Sept. 9, 1957, 71 Stat. 637. Legislative history reported at 2 U.S. Code Cong. & Ad. News 1966, 1974 (1957).

28 U.S.C.A. §1443:

"Any of the following civil actions or criminal prosecutions, commenced in a State court may be removed by the defendant to the district court of the United States for the district and division embracing the place wherein it is pending:

"(1) Against any person who is denied or cannot enforce in the courts of such State a right under any law providing

Smith v. *Texas*, note 19, *supra*, 311 U.S. 128, 132. Or, as the Court said in *Lane* v. *Wilson*, 1939, 307 U.S. 268, 275, ... S.Ct. ....., 83 L.Ed. 1281, another case of voting discrimination "The Amendment nullifies sophisticated as well as simple-minded modes of discrimination." Means of disenfranchising Negroes, like fraud, have historically been "as old as falsehood and as versable as human ingenuity." *Weiss* v. *United States*, 5 Cir., 1941, 122 F. 2d 675, 681, cert. denied, 314 U.S. 687, 62 S.Ct. 300, 86 L.Ed. 550. And "in determining whether a provision of the Constitution applies to a new subject matter, it is of little significance that it is one with which the farmers were not familiar." *United States* v. *Classic*, 1941, 313 U.S. 299, 316, ... S.Ct. ....., 85 L.Ed. 1368.

[fol. 80] VI.

The effect of the act is clear. The District Court so found. "As the boundaries are redefined by said Act No. 140 the municipality of Tuskegee resembles a 'sea dragon.' The effect of the Act is to remove from the municipality of Tuskegee all but four or five of the qualified Negro voters and none of the white voters."

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for the equal civil rights of citizens of the United States, or of all persons within the jurisdiction thereof.;

"(2) For any act under color of authority derived from any law providing for equal rights, or for refusing to do any act on the ground that it would be inconsistent with such law."

42 U.S.C.A. §§1981-1995

1981 (equal rights)
1982 (equal property rights)
1983 (action for deprivation of rights)
1984 (reviewable by Supreme Court)
1985 (action for conspiracy to interfere with civil rights)
1986 (action for failure to prevent interference)
1987 (officers may institute proceedings)
1988 (proceedings in conformity with common law)
1989 (additional commissioners)
1990 (penalty for failure to execute warrant)
1991 (provision for $5 fee for arrests)
1992 (President may request more speedy proceedings)
1993 (repealed)
1994 (peonage abolished)
1995 (new; fine and imprisonment for criminal contempt)

Even if the procedural effect of a motion to dismiss for failure to state a claim—admission of allegations—is disregarded the sheer statistics alleged may demonstrate a prima facie purpose of discrimination.

It might well be, as was true in *United States ex rel. Goldsby* v. *Harpole*, 5 Cir., 1959, 263 F.2d 71, that if Appellants were ever allowed the opportunity of a trial that "the naked figures [would themselves] prove startling enough." 263 F.2d 71, 78. In that case, involving exclusion of Negroes from juries, the fact that 57% of the population of Carroll County, Mississippi was Negro and yet no county official "could remember any instance of a Negro having been on a jury list of any kind," without refutation by the State of the reason for such a result was considered enough to prove systematic exclusion of Negroes from the juries of that county. This was the standard of proof of a prima facie case established by such cases as *Norris* v. *Alabama*, 1935, 294 U.S. 587, 55 S.Ct. 579, 79 L.Ed. 1074, and *Hernandez* v. *Texas*, 1954, 347 U.S. 475, 74 S.Ct. 667, ... L.Ed. ..... And in *United States* v. *Alabama*, 5 Cir., 1959, ... F.2d ..... [No. 17684, June 16, 1959], this Court took note [fol. 81] of the allegations that in Macon County, Alabama, the fact that 97% of the eligible whites were registered and *only 8% of the 14,000* eligible Negroes resulted in the fact that whites could outvote Negroes nearly three to one and was at least some evidence, if not proof, of discrimination in registration. ..... F.2d ....., ..., n.3. Perhaps the fact that in the present case the Act in question excludes 99% of the 400 Negro voters from the City of Tuskegee and yet not one single one of the 600 white voters will likewise be considered on the trial as proof enough of the discriminatory and unconstitutional purpose of the Act. But it is again well to point out that the adequacy of the proof in this case is not presently before us as we consider it on the basis of the complaint alone.

VII.

We need not be that "blind" Court that Mr. Chief Justice Taft described as unable to see what "all others can see and understand * * *." *Bailey* v. *Drexel Furniture Co.*

[Child Labor Tax Case], 1922, 259 U.S. 20, 37, ... S.Ct. ....., 66 L.Ed. 817. Cited in *United States* v. *Butler*, 1936, 297 U.S. 1, 61, ... S.Ct. ....., 80 L.Ed. 477; *United States* v. *Rumely*, 1953, 345 U.S. 41, 44, 73 S.Ct. 543, 97 L.Ed. 770; *Uphaus* v. *Wyman*, 1959, ... U.S. ....., ... S.Ct. ....., 3 L.Ed.2d ..... (dissenting opinion) [June 8, 1959] [dissent p. 17]. "[T]here is no reason why [we] should pretend to be more ignorant or unobserving than the rest of mankind." *Affiliated Enterprises* v. *Waller*, Del., ..., 5 A.2d 257, 261. How it can be suggested that we should, for some [fol. 82] reason, not make inquiry in this case is a mystery to me. Many cases could be cited but the most recent example will do. A little over a month ago, in deciding *Harrison* v. *NAACP*, 1959, ... U.S. ....., ... S.Ct. ....., 3 L.Ed.2d ..... [June 8, 1959], the Supreme Court took note of the District Court's findings that the acts there in question were passed "to nullify as far as possible the effect of the decision of the Supreme Court in *Brown* v. *Board of Education*, 347 U.S. 483 * * *" as parts of the general plan of massive resistance to the integration of schools of the state under the Supreme Court's decrees." ..... U. S. ....., ..., quoting from *NAACP* v. *Patty*, E.D.Va., 1958, 159 F.Supp. 503, 511, 515. The dissenting opinion notes the same findings, ... U.S. ....., ... [slip op. dissent p. 3], and refers to *Guinn* v. *United States*, 1915, 238 U.S. 347, ... S.Ct. ....., 59 L.Ed. 1340, and the celebrated Alabama case of *Schnell* v. *Davis*, 1949, 336 U.S. 933, ... S.Ct. ....., 93 L.Ed. 1093; affirming per curiam, S.D.Ala., 1949, 81 F.Supp. 872. The "legislative setting" surrounding the statute in the latter case was also alluded to in another case decided the same day, *Lassiter* v. *Northampton Election Board*, 1959, ... U.S. ....., ... S.Ct. ....., ... L.Ed. ..... [June 8, 1959]. In *Guinn* the Court observed that an Oklahoma "Grandfather Clause" statute could have "no discernible reason other than the purpose to disregard the prohibitions of the [Fifteenth] Amendment," 238 U.S. 347, 363, although the statute did not specifically declare as its purpose the disenfranchisement of Negroes. The District Court opinion in the *Schnell* v. *Davis* case discusses the legislative background of an "understand and explain the Constitution" registration requirement statute for three

[fol. 83] pages, 81 F.Supp. 872, 878-81, and concludes, at 880, 881:

> "The defendants argue that the Boswell Amendment is not 'racist in its origin, purpose or effect,' but, as has already been illustrated, a careful consideration of the conditions existing at the time, and of the circumstances and history surrounding the origin and adoption of the Boswell Amendment and its subsequent application, demonstrate that its main object was to restrict voting on a basis of race or color. That its purpose was such is further illustrated by the campaign material that was used to secure its adoption. * * * We cannot ignore the impact of the Boswell Amendment upon Negro citizens because it avoids mention of race or color; 'to do this would be to shut our eyes to what all others than we can see and understand.'"

And this Court has taken note that such inquiry into motive and purpose was a main theme of the *Davis* case. *Orleans Parish School Board* v. *Bush*, 5 Cir., 1957, 242 F.2d 156, 165.

Of course here, as in *Colegrove* v. *Green*, 328 U.S. 549, *supra*, the effect of the statute is not only a demonstration of its purpose but is enough to demonstrate its unconstitutionality standing alone. As Justice Black stated for three members of the Court,

> "Whether that was due to negligence or was a wilful effort to deprive some citizens of an effective vote, the admitted result is that the Constitutional policy of equality of representation has been defeated." 328 U.S. 549, 572.

[fol. 84]

VIII.

The District Court has quoted, and my Brothers have echoed, language from cases to the effect that legislative motive cannot be inquired into. E.g., *Doyle* v. *Continental Ins. Co.*, 1876, 94 U.S. 535, 24 L.Ed. 148; *Shuttlesworth* v. *Birmingham Board of Education*, D.Ala., 1958, 162 F.Supp. 372. It is necessary to ascertain precisely what they mean

by this discussion and quotations. Of course, at this late date, to "overrule" the principle of statutory interpretation would be somewhat like overruling the principle of stare decisis—equally as impossible and undesirable. It is so firmly established—and for so long—that a mere quotation from Corpus Juris Secundum is adequate to make the point.

> "Since the intention of the legislature, embodied in a statute, is the law, the fundamental rule of construction, to which all other rules are subordinate, is that the court shall, by all aids available, ascertain and give effect, unless it is in conflict with constitutional provisions, or is inconsistent with the organic law of the state, to the *intention* or *purpose* of the legislature as expressed in the statute." 82 C.J.S., Statutes § 321 (1953). (emphasis supplied)

What the Legislature of Alabama, as distinguished from its members, *intended* and what the *purpose* of the Legislature, as distinguished from its members, was in the enactment of this law is then a traditional matter for concern to the Judiciary. Obviously the Legislature of Alabama could have had the purpose of discriminating against Negro [fol. 85] voters. Many states have had such purpose as the cases discussed in Part V, *supra*, attest. All that *Doyle* can mean is that in the judicial process of ascertaining *legislative* purpose and intention the individual motives[31] and expression of the individual members is not pertinent.

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[31] For an interesting discussion of the distinction between inquiries into legislative "motive" and legislative "purpose" see NAACP v. Patty, E.D.Va., 1958, 159 F.Supp. 503, 515 n. 6, vacated and remanded for consideration by Virginia courts, ___ U.S. ___, ___ S. Ct. ___, ___ L.Ed.2d ___ [No. 127, June ___, 1959].

In ordinary usage the shadings of the three terms are subtle. Webster's New International Dictionary (2d ed. 1954): Purpose: "That which one sets before himself as an object to be attained; the end or aim to be kept in view in any plan, measure, exertion or operation; design; intention." Intention: "A determination to act in a certain way or to do a certain thing; purpose; design; as, an *intention* to go to Rome." Motive: "That within the individual, rather than without, which incites him to action; any idea, need, emotion, or organic state that prompts to an action."

But where the collective purpose and intention of the body is expressly stated or is ascertained on a trial by the exercise of traditional rules of statutory construction in the light of record facts, the judicial ascertainment and declaration of that purpose and intention is not prohibited by the fact that individual legislators, either in legislative chambers or through the press, may have uttered statements of startling candor.

Of course, to say that "If the State has the power to do an act, its intention or the reason by which it is influenced in doing it cannot be inquired into," *Doyle* v. *Continental Ins. Co., supra*, 94 U.S. 535, 541, quoted in *Shuttlesworth* v. *Birmingham Board of Education, supra*, 162 F.Supp. 372, 381, is to beg the question. If the sole and exclusive legisla- [fol. 86] tive purpose is to deprive citizens of a state of their constitutional rights then the state does not have "the power to do [that] act." Naturally, once this unconstitutional purpose is ascertained, and it is determined that the act is unconstitutional and beyond the power of a state legislature to enact, then it is unnecessary and unwise to try to find *why* the legislature harbored this purpose, to psychoanalyze them individually or collectively, and to try and verbalize the *motive* which prompted them to action.

This was recognized in *Doyle, supra*, when the Court made this almost self-defeating pronouncement: "The State of Wisconsin * * * is a sovereign State, possessing all the powers of the most absolute government in the world." 94 U.S. 535, 541. That this "most absolute government in the world" was nevertheless subject to some restraints was acknowledged by the parenthetical phrase ellipsed purposely from the quotation just made that "(except so far as its connection with the Constitution and laws of the United States alters its position)" Wisconsin is an absolute sovereign state.

Doyle like *Hunter* is not really then an aid to decision. Each represents only the result once it has been concluded that the particular act does not offend the Constitution. Each is a sweeping generalization, the effect of which would be to supplant all constitutional guaranties if literally applied.

If the Courts are not open to perform the traditional judicial function of ascertaining *legislative* purpose and intent, then these appellants stand helpless before the law [fol. 87] so that, as to the Fifteenth Amendment, in the memorable words of Chief Justice Marshall, "* * * the declaration that the Constitution * * * shall be the supreme law of the land, is empty and unmeaning declamation." *M'Culloch* v. *Maryland*, 4 Wheat. 316, 433, 4 L.Ed. 579, 608. The suggestion, implicit if not expressed, that "for protection against abuses by Legislators the people must resort to the polls, not to the Court." *Munn* v. *Illinois*, 1877, 94 U.S. 113, 134, ... S.Ct. ....., 24 L.Ed. 77; *Williamson* v. *Lee Optical of Oklahoma*, 1955, 348 U.S. 483, 488, 75 S.Ct. 461, 99 L.Ed. 563, is here unavailing.

For there can be no relief at the polls for those who cannot register and vote. Significantly the complaint in this case further alleged: "Macon County had no Board of Registrars to qualify applicants for voter registration for more than eighteen months, from January 16, 1956 to June 3, 1957. Plaintiffs allege that the reason for no Macon County Board of Registrars is that almost all of the white persons possessing the qualification to vote in said County are already registered, whereas thousands of Negroes, who possess the qualifications, are not registered and cannot vote." It was this fact, incidentally, which gave rise to the necessity of the dismissal of a cause of action against the Board of Registrars of Macon County for discriminatory practices in registration. *United States* v. *Alabama*, 5 Cir., 1959, ... F. 2d ..... [No. 17684, June 16, 1959]. In Macon County, of which Tuskegee is a geographical part, neither the Constitution nor Congress nor the Courts are thus far able to assure Negro voters of this basic right. [fol. 88] That this has occurred demonstrates, I think, that the Fifteenth Amendment contemplated a judicial enforcement of its guaranties against either crude or sophisticated action of states seeking to subvert this new right.

If the force of the ballot was to be the sole sanction for the effectual enforcement of the constitutional guaranty, it really created no right and imposed no prohibition. For

all that a recalcitrant state need do is neglect the implementing of its own election machinery. If a Court may strike down a law which with brazen frankness expressly purposes a rank discrimination for race, it has—and must have—the same power to pierce the veil of sham and, in that process, judicially ascertain whether there is a proper, rather than an unconstitutional, purpose for the act in question.

The Court denies the existence of that power. The Constitution is left to a majority of the Alabama Legislature.

X.

As Mr. Justice Frankfurter has recently said elsewhere, "The problem represented by this case is as old as the Union and will persist as long as our society remains a constitutional federalism." *Irvin* v. *Dowd*, 1959, ... U.S. ....., ... S.Ct. ....., 3 L.Ed. 2d ..... [May 4, 1959]. State Legislatures are accorded, and rightfully so, great respect and a far ranging latitude in their legislative programs. Occasionally there comes the time, however, when legislation oversteps its bounds. Then "it must * * * yield to an au- [fol. 89] thority that is paramount to the state." *Wisconsin* v. *Illinois*, 1930, 281 U.S. 179, 197, 50 S.Ct. 266, 74 L.Ed. 799 (per Holmes, J.).

In such times the Courts are the only haven for those citizens in the minority. I believe this is such a time.

I respectfully dissent.

WISDOM, Circuit Judge, concurring:

I concur fully in the majority opinion. However, the gravity of the issue, the gulf between the majority and dissenting opinions, and a few sharp quillets in the dissent impel me to make some observations on the application to the instant case of the doctrine of judicial abstention in political cases.

I.

The plaintiffs propose a cure worse than the disease. The Court therefore should withhold the exercise of its

equity powers. That was Mr. Justice Rutledge's view in an analogous situation. *Colegrove* v. *Green*, 1946, 328 U.S. 549, 566. That is my view in this case.

An attempt by the federal judiciary to control a state legislature's right to fix the boundaries of a political subdivision is an intrusion of national courts in the polity of a state that in a federal system carries consequences even [fol. 90] more serious and far-reaching than the partial disfranchisement of plaintiffs unable to vote in municipal elections because by legislative definition their voting district is not in a municipality. There are other considerations. The plaintiffs ask for something courts cannot give. Courts, any courts, are incompetent to remap city limits. And any decree in this case purporting to give relief would be a sham: the relief sought will give no relief.

There is an obvious reply: in a democratic country nothing is worse than disfranchisement. And there is no such thing as being just a little bit disfranchised. A free man's right to vote is a full right to vote or it is no right to vote. Perhaps so, but in similar situations—to me they are similar—the United States Supreme Court has made no such reply. Instead, in at least two decisions the Supreme Court declined jurisdiction when the relief from partial disfranchisement would require federal courts to intrude in the internal structure and organization of the government of a state. *Colegrove* v. *Green*, 1946, 328 U.S. 549; *South* v. *Peters*, 1950, 339 U.S. 276.

When Illinois partially disfranchised the citizens in its seventh congressional district by gerrymandering[1] away ninety per cent of their effective vote as against the vote of Illinois citizens in the fifth congressional district, the Court declined to interfere. *Colegrove* v. *Green*, 328 U.S. [fol. 91] 549. In congressional elections, therefore, 100,000 votes may equal 900,000 votes, and a thirty-five per cent minority may outvote a sixty-five per cent majority (over the state as a whole). Georgia, by the county-unit device,

[1] The Supreme Court of Illinois invalidated a 1931 reapportionment and ordered a return to the statute of 1901. Moran v. Bowley, 1932, Ill. S.Ct. 179 N.E. 526. Legislative inaction resulted in a gerrymander as effective as any gerrymander created by legislative action reshuffling district lines.

disfranchises citizens of Fulton County (Atlanta) by ninety-nine per cent as against citizens in certain rural counties.[2] When the constitutionality of the system was attacked in the Supreme Court, again the Court held that federal courts should not interfere. *South* v. *Peters*, 339 U.S. 276.

I can see no difference between partially disfranchising negroes and partially disfranchising Republicans, Democrats, Italians, Poles, Mexican-Americans, Catholics, blue-stocking voters, industrial workers, urban citizens, or other groups who are euchered out of their full suffrage because their bloc voting is predictable and their propensity for propinquity or their residence in certain areas, as a result of social and economic pressures, suggests the technique of partial disfranchisement by gerrymander or malapportionment. I can see no difference between depriving negroes of the right to vote in municipal elections in Tuskegee and not counting at their full value votes cast in certain districts in Illinois in a congressional election or votes cast in certain counties in Georgia in a state election. The dissenting justices in *Colegrove* v. *Green* and in *South* v. *Peters* found no sound distinction between those cases and the negro-voting cases.

[fol. 92] *Colegrove* v. *Green* and *South* v. *Peters* may be distinguishable at the periphery. At the center these cases and the instant case are the same. In the respect that *Colegrove* v. *Green* involved congressional districts, there was more reason for federal courts to intervene in Illinois' gerrymandering affecting federal elections than there would be to intervene in Alabama's gerrymandering that affects only municipal elections.

No one thinks that in *Colegrove* v. *Green* and *South* v. *Peters* the Supreme Court gave its constitutional blessing to partial disfranchisement. The Court did not reach the constitutional question. The Supreme Court was willing to assume that malapportionment was unconstitutional. "The Constitution", said Mr. Justice Frankfurter for the majority in *Colegrove* v. *Green*, "has many commands that are not enforceable by the courts, because they clearly fall

[2] For a defense of the system see Henson, The County Unit System is Constitution, 14 Ga. Bar J. 22 (1951).

outside the conditions and purposes that circumscribe judicial action."[3] In effect, the suit was "an appeal to the federal courts to reconstruct the electoral process of Illinois". Mr. Justice Frankfurter stated: "[T]he petitioners ask of [fol. 93] this Court what is beyond its competence to grant. . . . [T]his Court, from time to time, has refused to intervene in controversies . . . because due regard for the effective working of our government revealed the issue to be of a peculiarly political nature and therefore not meet for judicial interference." Mr. Justice Rutledge, concurring, stated:

> "[The Court has] power to afford relief in a case of this type. . . . But the relief it seeks pitches this Court into delicate relation to the functions of state officials and Congress, compelling them to take action which heretofore they have declined to take voluntarily or to accept the alternative of electing representatives from Illinois at large in the forthcoming elections. . . . If the constitutional provisions on which appellants rely give them the substantive rights they urge, other provisions qualify those rights in important ways by vesting large measures of control in the political subdivisions of the government and the state. . . . I think, therefore, the case is one in which the Court may properly, and should decline to exercise its jurisdiction."

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[3] Mr. Justice Frankfurter continued: "Thus, 'on Demand of the executive Authority,' Art. IV, §2, of a State it is the duty of a sister State to deliver up a fugitive from justice. But the fulfillment of this duty cannot be judicially enforced. Commonwealth of Kentucky v. Dennison, 24 How. 66. The duty to see to it that the laws are faithfully executed cannot be brought under legal compulsion. State of Mississippi v. Johnson, 4 Wall. 475. Violation of the great guaranty of a republican form of government in States cannot be challenged in the courts. Pacific States Telephone & Telegraph Co. v. Oregon, 223 U.S. 118. The Constitution has left the performance of many duties in our governmental scheme to depend on the fidelity of the executive and legislative action and, ultimately, on the vigilance of the people in exercising their political rights." Colegrove v. Green, 328 U.S. 549, 556.

In *South* v. *Peters*, 1950, 339 U.S. 276, a majority of the Supreme Court considered that the holding warranted only a short per curiam opinion: "Federal courts consistently refuse to exercise their equity powers in cases posing political issues arising from a state's geographical distribution of electoral strength among its political subdivisions." [fol. 94] Long before these cases the Cherokee Nation asked for an injunction to restrain the State of Georgia and its officials from asserting certain rights and powers over the people of the Cherokee Nation. In defiance of a treaty between the United States and the Cherokee Nation, Georgia had passed laws dividing the Indian territory into districts and subjecting the Cherokees to the jurisdiction of the state. The Cherokees had the sympathy of almost all Americans. They had no possible haven but the United States Supreme Court. The Court refused to take jurisdiction. *The Cherokee Nation* v. *The State of Georgia*, 1831, 30 U.S. (5 Pet.) 1, 8 L.Ed. 1. In the opinion for the Court, Chief Justice John Marshall went out of his way to write, by way of dictum:

> "If courts were permitted to indulge their sympathies, a case better calculated to excite them can scarcely be imagined. . . . A serious additional objection exists to the jurisdiction of the court. Is the matter of the bill the proper subject for judicial inquiry and decision? . . . The bill requires us to control the Legislature of Georgia, and to restrain the exertion of its physical force. The propriety of such an interposition by the court may be well questioned. It savors too much of the exercise of political power to be within the proper province of the judicial department."

II.

With due deference to my able associate, it seems to me that the rhetorical questions in the opening paragraphs [fol. 95] of the dissent assume a process of reaching a decision that is inapplicable to political cases. In political cases there are few absolutes and few either-or questions. There may be some matters that clearly fall within the exclusive control of the executive or the legislative branches

of government or controversies that these political departments manifestly may settle more appropriately than the judicial department. Courts then apply the doctrine of abstention almost automatically. But since every official act is political in a sense, in most cases courts are driven to inquire. How political? And what are the consequences of granting or denying the relief requested? Because of this and because discretionary equitable powers usually are invoked, courts have considered it proper to take a pragmatic approach and to weigh a variety of considerations in reaching a decision, not stopping, for example, with the flat statement that the issue is political and non-justiciable.[4] A weighing of practical considerations along with broad principles may blur the line between no-jurisdiction and jurisdiction-but-abstention; yet it has characterized [fol. 96] political cases since *Luther* v. *Borden*, 1849, 7 How. (U.S.) 1.

To abstain or not to abstain in a hard case that seriously affects the balance between the federal government and the states puts a court to the task of assaying values and assessing effects. Here we must weigh the value, in a federal system, of preserving the integrity of a state as a polity, including a state's control over its political subdivisions and the state administrative process—against the value of an individual's right to vote in city elections when as a consequence of a state law gerrymandering municipal

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[4] In Colgrove v. Green, for example, the Court attached importance to these considerations: the court lacked satisfactory criteria for a judicial determination; the basis for the suit was not a private wrong, but a wrong suffered by Illinois as polity; no court can affirmatively remap the Illinois districts; it is hostile to a democratic system to involve the judiciary in the politics of the people; regard for the Constitution as a viable system precludes judicial correction, since authority for dealing with the problem resides first with Congress and ultimately with the people (to secure a state legislature that will apportion properly); malapportionment is chronic and embroiled in politics, and courts should avoid this political thicket; the Constitution has many commands that are not enforceable but left to legislative or executive action, and ultimately to the people; the possible consequences of decision were of great magnitude and the judicial processes inadequate for dealing with them; in our system of government it is appropriate that Congress have the final determination whether to seat Congressmen.

limits he does not live in a municipality. We must weigh the effects of federal action against inaction, of judicial intervention against self-limitation. This weighing of values and effects is in no sense a play on the word "political". It is a reasonable basis for a decision that may appear indefensible only when the case is sought to be reduced to the single question: did the plaintiff have a constitutional right of which he was deprived or did he not?

III.

In my judgment, *Colegrove* v. *Green* and *South* v. *Peters* control this case. Even if they were not controlling, I would favor withholding the exercise of our equity powers for the reasons given and for the following reasons.

(1) Grant of relief would put federal courts in the position of interfering with the internal governmental struc- [fol. 97] ture of a state, putting a new kind of strain on federal-state relations already severely strained. Control over the political subdivisions of a state including the incorporation of cities and towns and the determination of their boundaries, is a political function of the state legislature and an attribute of state sovereignty in a federal union. So it has always been held. Let the chips fall where they may, the courts have decided. This is the substance of the holdings in *Laramie County* v. *Albany County*, 1876, 92 U.S. 307; *Town of Mount Pleasant* v. *Beckwith*, 1879, 100 U.S. 514; and *Hunter* v. *Pittsburgh*, 1907, 207 U.S. 161. In these and similar cases the citizens who suffered from changes in city limits, by loss of property values or by increased taxation (if the boundaries are extended) or from lack of fire and police protection (if the boundaries are contracted) and from loss of voting privileges (in the case of a gerrymander), were in the same situation as the plaintiffs are in this case.

(2) The plaintiffs ask the Court to hold unconstitutional a law that is clearly constitutional on its face. The statutory approach necessary to reach that somewhat unusual result would compel the Court to go beneath the surface of the law and impute to the legislature an unprofessed subjective intention. This ulterior motive, when coupled

with inferences from the effect of the law, would then be fatal to the constitutionality of the statute. As Mr. Justice Cardozo put it, this process spreads psychoanalysis to unaccustomed fields. *United States* v. *Constantine*, 296 U.S. 287, 299. I recognize that occasionally there may be statutes [fol. 98] which are unconstitutional in the light of their effect and the legislature's intentions. Over the long pull, however, I believe that the interests of justice lie in the direction of testing a law in the light of what the law says, not in the light of what the legislature intends. Rather than deviate from that principle in a case involving the exercise of a political function historically lodged with the state and free from federal supervision, I would heed the frequent admonition to avoid a decision upon the constitutional question when there is a tenable alternative ground for disposing of the controversy.

(3) This case differs from all cases involving successful complaints of discrimination under the Fourteenth and Fifteenth Amendments in that there is no effective remedy. An injunction will enable a citizen to vote—if he lives in a voting district where an election is held. It is an empty right when he does not live in a voting district. The best that this Court could do for the plaintiffs would be to declare Act 140 of 1957 invalid. There is nothing to prevent the legislature of Alabama from adopting a new law redefining Tuskegee town limits, perhaps with small changes, or perhaps a series of laws, each of which might also be held unconstitutional, each decision of the court and each act of the legislature progressively increasing the strain on federal-state relations. As stated in Colegrove: "No court can affirmatively remap the Illinois districts. . . . At best we could only declare the existing electoral system invalid." Nor can this Court remap Tuskegee. If we had the competency to determine the proper geographical limits for [fol. 99] towns in Alabama, still there would be no way of our giving effect to the talents of judges: the plaintiffs' only real remedy is one we have no right to give—a mandamus against the legislature of Alabama.

In short, the situation is unmanageable. If we intervene we shall only intensify the very dispute we are asked to settle. And federal courts have no mission—from the

constitution or from that brooding omnipresence of higher law so often an influence on constitutional decisions—to find a judicial solution for every political problem presented in a complaint that makes a strong appeal to the sympathies of the court. To repeat the words of Chief Justice John Marshall: "If courts were permitted to indulge their sympathies, a case better calculated to excite them can scarcely be imagined. . . . [But] such an interposition by the court . . . savors too much of the exercise of political power to be within the proper province of the judicial department."

[fol. 100]

IN THE UNITED STATES COURT OF APPEALS

No. 17589

C. G. GOMILLION, et al.,

—v.—

PHIL M. LIGHTFOOT, as Mayor of the City of Tuskegee, et al.

JUDGMENT—September 15, 1959

This cause came on to be heard on the transcript of the record from the United States District Court for the Middle District of Alabama, and was argued by counsel;

On Consideration Whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered and adjudged that the appellants, C. G. Gomillion, and others, be condemned, in solido, to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

"Brown, Circuit Judge, Dissenting."

"Wisdom, Circuit Judge, Specially Concurring."

[fol. 101] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 102]

SUPREME COURT OF THE UNITED STATES

No. .....—October Term, 1959

C. G. GOMILLION, et al., Petitioners,

—v.—

PHIL M. LIGHTFOOT, as Mayor of the City of Tuskegee, et al.

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

Upon Consideration of the application of counsel for petitioner(s),

It Is Ordered that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including February 1, 1960.

Hugo L. Black, Associate Justice of the Supreme Court of the United States.

Dated this 4th day of December, 1959.

[fol. 103]

SUPREME COURT OF THE UNITED STATES

No. 668—October Term, 1959

C. G. GOMILLION, et al., Petitioners,

—v.—

PHIL M. LIGHTFOOT, as Mayor of the City of Tuskegee, et al.

ORDER ALLOWING CERTIORARI—March 21, 1960

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

FILE COPY

IN THE

Supreme Court of the United States

October Term, 1959

No. ~~668~~ 32

C. G. GOMILLION, *et al.*,
Petitioners,

v.

PHIL M. LIGHTFOOT, as Mayor of the City of Tuskegee, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE FIFTH CIRCUIT

ROBERT L. CARTER,
20 West 40th Street,
New York, New York,

FRED D. GRAY,
34 North Perry Street,
Montgomery, Alabama,

ARTHUR D. SHORES,
1630 Fourth Avenue, North,
Birmingham, Alabama,
Counsel for Petitioners.

IRMA ROBBINS FEDER,
of Counsel.

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IN THE

Supreme Court of the United States

October Term, 1959

No.

C. G. GOMILLION, *et al.*,

Petitioners,

v.

PHIL M. LIGHTFOOT, as Mayor of the City of Tuskegee, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above-entitled cause on September 15, 1959.

Opinions Below

The memorandum opinion of the District Court (R. 29-40) is reported at 167 F. Supp. 405. The opinion of the Court of Appeals (R. 48-99), reported at 270 F. 2d 594, is appended hereto, *infra* at page 17.

Jurisdiction

The judgment of the Court of Appeals (R. 100) was entered on September 15, 1959 (and is appended hereto, *infra* at page 61). Application for an extension of time to and until February 1, 1960, in which to file this petition was granted by Mr. Justice Black in an order dated December 4, 1959. The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254(1).

Question Presented

May a state exclude from an incorporated city substantially all of its Negro residents and voters, *and no other residents or voters*, by the device of a legislative alteration of the boundaries of the municipality without contravening the Fourteenth and Fifteenth Amendments to the Constitution of the United States, where the alteration produces a highly irregular geographic outline, and is not thus far shown or suggested to have been based upon any consideration other than to deprive Negroes of the benefits of residence within the city limits?

Statute Involved

Act No. 140

To alter, re-arrange, and re-define the boundaries of the City of Tuskegee in Macon County.

Be It Enacted by the Legislature of Alabama:

Section 1. The boundaries of the City of Tuskegee in Macon County are hereby altered, re-arranged and re-defined so as to include within the corporate limits of said municipality all of the territory lying within the following described boundaries, and to exclude all territory lying outside such boundaries:

Beginning at the Northwest Corner of Section 30, Township 17-N, Range 24-E in Macon County, Alabama; thence South 89 degrees 53 minutes East, 1160.3 feet; thence South 37 degrees 34 minutes East, 211.6 feet; thence South 53 degrees 57 minutes West, 545.4 feet; thence South 36 degrees 03 minutes East, 1190.0 feet; thence South 53 degrees 57 minutes West, 675.2 feet; thence South 36 degrees 19 minutes East, 743.4 feet; thence South 33 degrees 50 minutes East, 1597.4 feet; thence North 61 degrees 26 minutes East, 1122.8 feet; thence North 28 degrees 34 minutes West, 50.0 feet; thence North 59 degrees 11 minutes

East, 1049.3 feet; thence South 30 degrees 48 minutes East, 500 feet; thence North 50 degrees 08 minutes East, 341.1 feet; thence North 47 degrees 08 minutes East, 1239.4 feet; thence South 42 degrees 51 minutes East, 300.0 feet; thence South 47 degrees 00 minutes West, 1199.5 feet; thence South 64 degrees 09 minutes East, 1422.0 feet; thence South 24 degrees 13 minutes East, 488.7 feet; thence South 73 degrees 25 minutes West, 370.8 feet; thence North 79 degrees 25 minutes West, 2285.3 feet; thence South 61 degrees 26 minutes West, 1232.6 feet; thence South 41 degrees 03 minutes East, 792.3 feet; thence South 12 degrees 03 minutes East, 842.2 feet; thence North 88 degrees 09 minutes East, 4403.6 feet; thence South 0 degrees 15 minutes West, 6008.2 feet; thence North 89 degrees 59 minutes West, 4140.2 feet; thence North 34 degrees 46 minutes West, 6668.7 feet; North 35 degrees 00 minutes West, 380.4 feet; thence North 16 degrees 55 minutes West, 377.2 feet; thence North 54 degrees 29 minutes East, 497.8 feet; thence North 35 degrees 02 minutes West, 717.5 feet; thence South 54 degrees 03 minutes West, 1241.9 feet; thence North 36 degrees 09 minutes West, 858.4 feet; thence North 44 degrees 28 minutes East, 452.2 feet; thence North 22 degrees 33 minutes East, 4305.9 feet; thence North 86 degrees 43 minutes East, 236.3 feet to the point of beginning.

Section 2. All laws or parts of laws which conflict with this Act are repealed.

Section 3. This Act shall become effective immediately upon its passage and approval by the Governor, or upon its otherwise becoming a law.

This bill became an Act on July 15, 1957 without approval by the Governor.

Statement

Petitioners, who are of Negro origin, are citizens of the United States and of the State of Alabama and residents of the City of Tuskegee, Alabama, as the geographical

lines of that municipality were constituted prior to the passage of Act 140 of the Alabama Legislature, 1957 Regular Session, hereinabove set forth (R. 5), the statute herein challenged.

Act 140, described as "another bid to maintain total segregation" (Montgomery Advertiser-Alabama Journal, May 19, 1957, p. 16 (R. 22)), was introduced on June 7, 1957 by State Senator Sam Engelhardt of Macon County, of which Tuskegee is the county seat (R. 8). Senator Engelhardt is also the author of an amendment to the State Constitution permitting the abolition of Macon County, which was approved in December, 1957 by a majority of those voting on the proposal (R. 9). Senator Engelhardt is executive secretary of the Alabama Association of Citizens Councils (New York Times, July 14, 1957, p. 51, col. 1). He explained that because the Negro population was dominant in Macon County (approximately 87 per cent (R. 8)), state action was needed to prevent Negro control of governmental affairs; and that his legislation was intended to "offset the coming civil rights legislation in Washington" (New York Times, July 14, 1957, p. 51, col. 1). This was apparent reference to the Civil Rights Act passed by Congress later in 1957, which included new measures to assure Negroes the right to vote. Senator Engelhardt was also quoted as saying: "We couldn't stand seeing a Negro in the Alabama legislature" (New York Times, July 7, 1957, p. 41, col. 1).

On the grounds that the disenfranchisement and deprivations which Act 140 effected were purposeful and grounded solely in racial and color considerations in violation of both the Fourteenth and Fifteenth Amendments to the Constitution of the United States, petitioners instituted the instant action in the United States District Court for the Middle District of Alabama on behalf of themselves and all others similarly situated. A declaratory judgment to

the effect that Act 140, as applied, violated the Fourteenth and Fifteenth Amendments was sought (R. 11). Petitioners also prayed for temporary and permanent injunctions to restrain respondents from enforcing the aforesaid statute and from denying to petitioners and other Negroes similarly situated rights and privileges incident to their status as residents and citizens of the City of Tuskegee (R. 11-12).

The complaint alleged that prior to the passage of Act 140, Tuskegee was square in shape and had a population of approximately 5,397 Negroes, of whom approximately 400 were qualified as voters, and some 1,310 white persons, of whom approximately 600 were electors (R. 7).

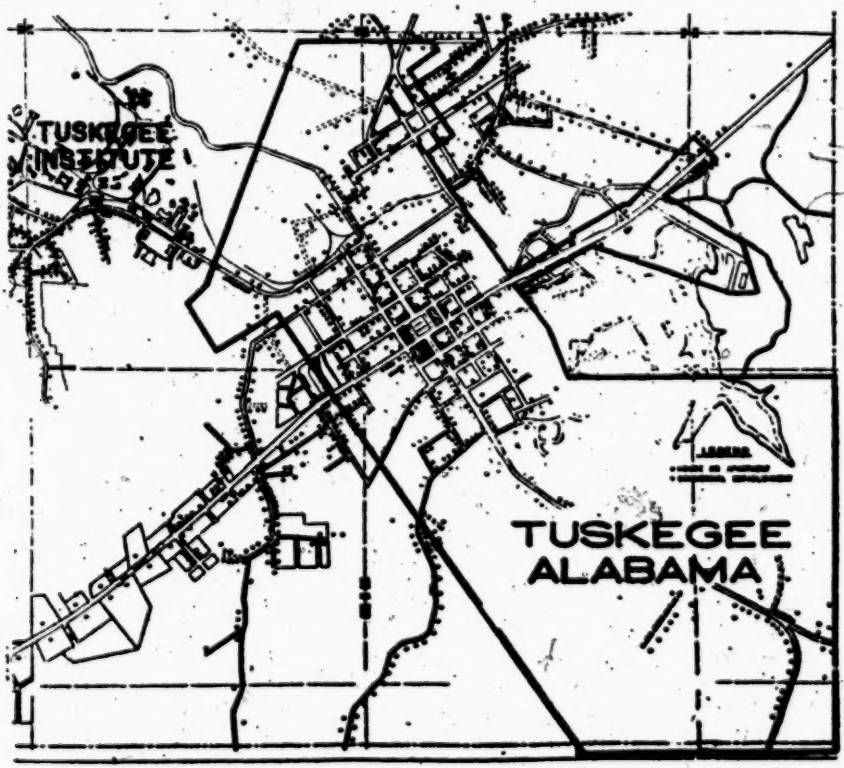

CHART SHOWING TUSKEGEE, ALABAMA, BEFORE AND AFTER ACT 140

As re-defined, the reduced area of Tuskegee takes on a highly irregular shape with 28 sides resembling a "sea dragon". No reason for the change in boundary lines is set forth in the Act. In operation, the statute removed and excluded from the City of Tuskegee all Negro neighborhoods, including the world-famous Tuskegee Institute, and all but four or five of its qualified Negro voters; it removed no white residents or voters (R. 7).[1] The complaint alleged that the petitioners and other Negro residents, similarly removed, were thereby deprived of benefits which they had enjoyed when domiciled in Tuskegee, including, of course, the right to vote in municipal elections (R. 7, 10).

The complaint further alleged that Tuskegee is the county seat of Macon County in which seven-eighths of the population are Negroes (R. 8). Macon County had had no Board of Registrars to qualify applicants for voter registration for more than 18 months, from January 16, 1956 to June 3, 1957 (R. 8). Petitioners alleged as reason therefor the fact that almost all white qualified voters in the county were already registered, whereas thousands of Negroes who possess the necessary qualifications are not registered and cannot vote (R. 8).

Petitioners alleged that the obvious purpose and necessary effect of Act 140 was to disenfranchise Negro citizens as electors in Tuskegee and to deprive them of police patrol, general street improvements and the right of effective participation in municipal affairs (R. 10-11).

Respondents filed a motion to strike on the ground that Rule 8(e) of the Federal Rules of Civil Procedure had been violated (R. 24) and a motion to dismiss on the ground that the complaint failed to state a claim upon which relief could be granted (R. 26). The Court denied the motion to strike (R. 39-40), but granted the motion

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[1]See also Report of the United States Commission on Civil Rights (1959), page 77.

to dismiss (R. 39-40). On appeal, the Court of Appeals affirmed by a divided vote.

Reasons for Allowance of Writ

1. The decision below is inconsistent with the line of decisions of this Court extending from *Yick Wo* v. *Hopkins*, 118 U. S. 356, through *Guinn* v. *United States*, 238 U. S. 347; *Nixon* v. *Herndon*, 273 U. S. 536; *Nixon* v. *Condon*, 286 U. S. 73; *Lane* v. *Wilson*, 307 U. S. 268; *Smith* v. *Allwright*, 321 U. S. 647; and *Terry* v. *Adams*, 345 U. S. 461, through *Buchanan* v. *Warley*, 245 U. S. 60, through *Norris* v. *Alabama*, 294 U. S. 587; *Pierre* v. *Louisiana*, 306 U. S. 354; *Smith* v. *Texas*, 311 U. S. 128; *Hill* v. *Texas*, 316 U. S. 400; *Cassell* v. *Texas*, 339 U. S. 282; and *Hernandez* v. *Texas*, 347 U. S. 475, through *Takahashi* v. *Fish and Game Commission*, 334 U. S. 410, through *Sweatt* v. *Painter*, 339 U. S. 629; *McLaurin* v. *Oklahoma State Regents*, 339 U. S. 637; *Brown* v. *Board of Education*, 347 U. S. 483, and *Cooper* v. *Aaron*, 358 U. S. 1, through and including *Mayor and City Council of Baltimore* v. *Dawson*, 350 U. S. 877; *Holmes* v. *City of Atlanta*, 350 U. S. 879; *Gayle* v. *Browder*, 352 U. S. 903, and very recently *Evers* v. *Dwyer*, 358 U. S. 202, and *State Athletic Commission* v. *Dorsey*, 359 U. S. 533.

The opinions of both the District Court and that of Judge Jones in the Court of Appeals stressed the point that the action of a state in establishing or changing the boundaries of a municipality is not subject to review. The ground of decision of the Court of Appeals is aptly summarized in the concluding paragraph of the controlling opinion (270 F. 2d 594, 598-99, *infra* at 25):

> "Our consideration of what we regard to be the applicable rules of law leads us to the conclusion that, in the absence of any racial or class discrimination appearing on the face of the statute, the courts will not hold an act, which decreases the area of a municipality by changing its boundaries, to be invalid as violative of the Fourteenth and Fifteenth Amendments to the United States Constitution,

> although it is alleged that the enactment was made for the purpose, not appearing in the Act, and with the effect of excluding or removing Negroes from the City and depriving them of the privileges and benefits of municipal membership, including the right to vote in City elections. Since we have reached this conclusion, it follows that the judgment of the district court must be
>
> Affirmed."

This statement is in irreconcilable conflict with the aforementioned decisions of this Court. Each of those cases dealt with an activity largely subject to regulation and control in the discretion of the states and their subordinate units, including municipal bodies. Yet, in each instance this Court held that the Fourteenth or Fifteenth Amendment or both forbade the establishment of an excluding classification or demarcation based on race, color or national origin. This was true whether the question involved the regulation of laundries or fishing, qualification for voting or for jury duty, zoning regulations, public education in schools, colleges or universities, public recreation, transportation or sports exhibitions.

The courts below would render state power to establish or alter municipal boundaries immune from the Fourteenth Amendment's command of due process and equal protection of the laws and the proscriptions of the Fifteenth Amendment as well. But this Court has answered similar assertions many times—most recently, perhaps, in *Cooper* v. *Aaron, supra* at 19, where every member of the Court joined in saying:

> "It is, of course, quite true that the responsibility for public education is primarily the concern of the States, but it is equally true that such responsibilities, *like all other state activity,* must be exercised consistently with federal constitutional requirements as they apply to state action." (Emphasis supplied.)

In its most notable recent decisions above referred to, the Court has ruled that no municipality or other

public body may deny its facilities, be they educational or recreational, to persons classified according to race or color. Those decisions will soon be rendered meaningless if geographic boundaries may be altered so as to accomplish the explicit racial exclusions and disqualifications which this Court has found proscribed by the federal Constitution. Logic makes its demands. If Negroes, as a group, may not be excluded from some of the public facilities of a city, it must necessarily follow that they cannot be removed and disqualified from all of the municipal benefits and facilities open to citizens of other racial origins.

Indeed, it is hardly thinkable that the courts below—despite some of the language of the opinions—would have upheld Act 140, if on its face it had operated explicitly to withdraw the boundaries of the City of Tuskegee beyond the area of habitation of its Negro citizens, and this whether the statute had so acted unfailingly and in every case, or only where the habitation of Negro citizens was predominant. Cf. *Cassell* v. *Texas, supra; and Buchanan* v. *Worley, supra.*

2. The question, then, is whether Act 140 is saved, as the Court of Appeals concluded it was, "in the absence of any racial or class discrimination appearing on the face of the statute". The decisions of this Court make it clear that it is not.

Yick Wo v. *Hopkins, supra,* involved an ordinance requiring the licensing of laundries, unless conducted in buildings of brick or stone. The ordinance was fair on its face, nor was the administration explicitly discriminatory. But the facts showed over two hundred Chinese applicants had been denied a license while "eighty others, not Chinese subjects, are permitted to carry on the same business under similar conditions" (*Id.* at 374). It followed, in the words of this Court, "[t]he fact of this discrimination is admitted. No reason for it is shown, and the conclu-

sion cannot be resisted, that no reason for it exists except hostility to the race and nationality to which the petitioners belong, and which in the eye of the law is not justified. The discrimination is, therefore, illegal, . . ." (*Ibid.*). It does not require paraphrase to demonstrate the applicability of this historic decision to the facts alleged in the petitioners' complaint, which the courts below have dismissed.

When a state sought to define the qualifications for voting in statutes which were not discriminatory on their face, but which nevertheless operated to exclude Negro voters, this Court had no doubt that the discriminatory operation of the statutes brought them into conflict with the national Constitution, whether the device was the relatively crude one of the "grandfather clause" of *Guinn* v. *United States, supra*, or the somewhat subtler and slightly more flexible exclusion involved in *Lane* v. *Wilson, supra*. "The Amendment nullifies sophisticated as well as simple-minded modes of discrimination." *Lane* v. *Wilson, supra* at 275. And see *Smith* v. *Allwright, supra*, and *Terry* v. *Adams, supra*.

And in the field of education, this Court has only recently made pointed warning that a statute non-discriminatory on its face might be rendered unconstitutional in its application. *Shuttlesworth* v. *Birmingham Board of Education*, 358 U. S. 101, referring specifically to page 384 of the District Court's opinion, 162 F. Supp. 372, 384.[2]

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[2] Of similar import, *see* United States v. Curtis M. Thomas, in which this Court on January 26, 1960, in a per curiam order invited the Solicitor General to file a petition for writ of certiorari and, in the event the petition is filed, set the cause down for argument on February 23, 1960. There, a United States District Judge ordered restored to the voting rolls the names of 1,377 Negroes who had been purged in what state officials sought to justify as a nondiscriminatory effort to remove unqualified voters from the voting lists. The District Court, despite a profession of a lawful purpose, found unlawful discrimination to have been the intent and effect of the state's action.

Perhaps the most detailed and frequent consideration of an analogous problem has come in the long series of decisions of this Court dealing with the exclusion of Negroes or national groups from juries. In none of these cases after the first, *Neal* v. *Delaware*, 103 U. S. 370, did the statutes on dealing with qualification for jury service explicitly suggest unconstitutional discriminatory standards. Yet from *Norris* v. *Alabama, supra*, through its recent decision in *Hernandez* v. *Texas, supra* (see also the Memorandum of January 18, 1960, in *Bailey* v. *Henslee*, — U. S. —, 28 L. W. 3217), this Court has consistently held that continued absence from, or only token presence on, jury panels of Negroes or defined national groups in communities, where there were substantial numbers qualified for jury service, established a *prima facie* case of unconstitutional discrimination.

Here, the facts alleged in the complaint demonstrate as stark a pattern of discrimination as that in *Norris* v. *Alabama*. In the phrase of *Neal* v. *Delaware, supra* at 397, it would require a "violent presumption" to assume that the altered and irregular boundaries of Tuskegee, excluding virtually all of its Negro residents and Negro voters, and no white voters or residents, did not establish, at the very least, a *prima facie* case of unconstitutional discrimination. Whether it is the fact of discrimination or purposeful discrimination which may ultimately prove significant (see the majority and concurring opinions in *Cassell* v. *Texas, supra* at 282, 290 and 296), those refinements are not now relevant. The complaint alleges purposeful discrimination (R. 10-11), and the judgment sought to be reviewed is a judgment dismissing the complaint as defective in that it failed to allege a valid cause of action. Even without the averment of purposeful discrimination, "the law would have to have the blindness of indifference rather than the blindness of impartiality" (*Cassell* v. *Texas* at 298) not to find, at least, a *prima facie* case of purposeful discrimination.

It is perhaps possible that on a hearing of this case considerations other than unalloyed discrimination may be advanced to support the altered boundaries which the Legislature of Alabama has sought to establish. While a mere recital of permissible motives would hardly be sufficient to support the statute, *Dean Milk Company* v. *City of Madison*, 340 U. S. 349, 354, it may be that considerations can be advanced which would diminish the force of the *prima facie* case alleged in the complaint. Then, as in the jury cases, differentiations such as those which were made between *Cassell* v. *Texas* and *Hill* v. *Texas*, *supra*, on the one hand, and *Akins* v. *Texas*, 325 U. S. 398, on the other, might be relevant. No such evaluation is here required. This complaint establishes a pattern of discrimination harsh and unrelieved. Those allegations require a hearing. Possibly, but only after such a hearing has been held, could a court be called upon to consider whether mitigating factors exist.

3. Because the pattern of discrimination set forth in the complaint is sharp and clear, this case involves no issues similar to those considered in *Colegrove* v. *Green*, 328 U. S. 549, and *South* v. *Peters*, 339 U. S. 276, as Judge Wisdom apparently thought it did, 270 F. 2d 594, 611 et seq. (*infra*, at 52). Though the Court has never attempted an exhaustive statement of the considerations which render an issue "political" and non-justiciable, two common aspects of such cases are clear. One is that in such matters as districting or the setting up an electoral system, a legislature has a wide range of choices involving the interplay and evaluation of many legitimate, but imponderable, considerations. In such instances, judicial review is difficult if not impossible, if those factors properly open to legislative determination are not to be foreclosed. The second aspect common to issues deemed "political" is the difficulty, or the awkwardness, of affording appropriate relief.

Neither factor is applicable to this case. The fact that a legislature has a wide range of choices does not mean that the Constitution does not put some considerations

beyond the pale. Neither *Colegrove* v. *Green* nor *South* v. *Peters* could be thought to control, if a legislature established a "separate list" for Negro voters and permitted them to vote only for one or more separately designated Representatves, while districting other voters according to geographic location. Other cases involving geographic boundaries producing discrimination less clear than this may possibly require consideration of *Colegrove* v. *Green* and *South* v. *Peters*. This case does not. If petitioners may pursue the analogy of the jury cases yet a step further, this case is not more closely related to *Colegrove* v. *Green* and *South* v. *Peters* than *Norris* v. *Alabama* and *Hernandez* v. *Texas* were to *Fay* v. *New York*, 332 U. S. 261, and *Moore* v. *New York*, 333 U. S. 565. This case, the *Norris* and *Hernandez* cases involve clear patterns of racial or national discrimination. If such distinctions were present in the latter cases, their presence was thought to be too remote to warrant judicial intervention.

Nor is there difficulty in awarding relief here. In *Colegrove* v. *Green* and *South* v. *Peters*, it was thought that judicial relief might have brought the Court into conflict with Congress in an area of responsibility specifically awarded to Congress by the Constitution. That is not true here, and the formulation of a decree poses no problem. The complaint requests only that an amending statute be held inoperative, and action pursuant to it be enjoined. This is a common form of relief, granted in scores of cases.

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4. Although an aggregate of all rights incident to residence in a city is involved here, the particular importance of the right to vote warrants special stress. In the last few years, increasing attention has been focused on the fact that Negroes are disenfranchised because of their race in many sections of the country. In 1957 Congress, in the first federal civil rights legislation in 82 years, addressed itself to this problem. It set up a new mechanism to enable the

federal government to play a more active role in the protection of the Negro's right to vote by creating a Civil Rights Commission, whose primary function is the investigation of complaints of unconstitutional denials of franchise rights, and by empowering the Attorney General to use civil remedies to protect the right to vote. (For a description of the Civil Rights Act of 1957, see Brief for the United States in *United States* v. *Raines*, No. 64, October Term, 1959, argued here on January 12, 1960.)

The first report of the Commission issued on September 9, 1959 documents the extent to which Negroes are illegally excluded from the ballot—and the devices used to perpetuate such discrimination. (See, generally, pages 40-68, Report of the United States Commission on Civil Rights, 1959.) Only 25 per cent of the Negroes of voting age in the South are registered in contrast to 60 per cent of the whites (*Id.* at 40-41). Negroes make up 29.5 per cent of Alabama's voting age population, but only 8.1 per cent of those registered (*Id.* at 49). The Commission notes that the main opportunity for Negro participation in the political life of the South is in urban areas (*Id.* at 52-55), because Negroes are most likely to be frightened or coerced out of their right to vote in rural counties where they are in a majority (*Ibid.*).

The Commission discusses the voting situation in *Alabama* in detail (*Id.* at 69-97), and particularly in Macon County, where petitioners reside. It received more complaints from Macon County about voting discrimination than from any other county in the nation (*Id.* at 56), and enumerates a host of devices used by the officials of Macon County to prevent Negroes from registering. The Board of Registrars ceased to function for periods of months or years (*Id.* at 75-76); Negro applicants were subjected to extended delays and denied registration despite being "well educated" and "previously registered in one or more other states" (*Id.* at 90-91); and in its findings the Commission details other discriminatory techniques (*Id.* at 90-92).

In 1950, Macon County had a population of approximately 27,000 Negroes and 3,177 whites. In 1958, there were 1,218 registered Negro voters and 3,102 whites (*Id.* at 92). After suit was brought in 1946, *Mitchell* v. *Wright*, 154 F. 2d 924 (5th Cir.), to require the Board to register Negroes, it resigned and ceased to function for 18 months (*Id.* at 75, 76). One witness before the Commission estimated that at the present rate it would take 203 years for the currently eligible but unregistered Negroes to become qualified voters (*Id.* at 76). When the United States brought suit under the 1957 Act, the suit was dismissed because the Macon County registrars had again resigned. That case is now before this Court on writ of certiorari (*United States* v. *Alabama*, No. 398, October Term, 1959).

The Commission also makes specific reference to the state statute at issue in this litigation. After discussing the difficulties faced by Negroes trying to register in Macon County, it states: "Not content to hold the line against new Negro voters, the City of Tuskegee recently moved to decrease the number already voting in its election . . ." (*Id.* at 77).

The critical importance of the instant case for the future of the Negro's struggle for equal citizenship rights emerges against the background of these facts. The ballot is the key to all other rights. In urban centers of the South, the growing political strength of the Negro has already had its effect in securing him an improved economic and social status and better treatment as a man.

The Attorney General of the United States, in explanation of new legislative proposals designed to insure more adequately exercise of the franchise by Negroes, highlighted the great weight which free exercise of the ballot must be given in a democratic society. His statement is particularly relevant in consideration of the issues which this case poses:

> "It has been an unpleasant fact for too many years that in a few areas of the country segments of our population have been systematically and de-

liberately denied the right to vote because of their race or color. Fortunately, in recent times there has been a growing concern with the problem and a strong national determination to end racial discrimination in all its forms. It is particularly important to do so in the field of voting. Discrimination in that field is totally inconsistent with our democratic system. Then, too, the opportunity to use the ballot is a principal means by which other forms of racial discrimination may be combatted" (New York Times, January 27, 1960, p. 18).

If a city may be carved up to exclude Negroes from its political affairs, and if the federal courts cannot grant relief pursuant to the Fourteenth and Fifteenth Amendments to the federal Constitution, the state's action is foreclosed to challenge in the only forum where, at present, relief can be obtained. If this can be done with impunity, the bitter-end opponents of equal citizenship rights will have found a ready new device to perpetuate racial discrimination in effective nullification of the decisions of this Court.

CONCLUSION

Wherefore, for the reasons hereinabove stated, it is respectfully submitted that this petition should be granted.

ROBERT L. CARTER,
20 West 40th Street,
New York, New York,

FRED D. GRAY,
34 North Perry Street,
Montgomery, Alabama,

ARTHUR D. SHORES,
1630 Fourth Avenue, North,
Birmingham, Alabama,

Counsel for Petitioners.

IRMA ROBBINS FEDER,
of Counsel.

APPENDIX

The Opinion of the Court of Appeals for the 5th Circuit entered on September 15, 1959 before JONES, BROWN and WISDOM, Circuit Judges.

JONES, Circuit Judge: The Legislature of Alabama passed a statute which changed the boundaries of the City of Tuskegee in Macon County of that State. The boundary changes reduced the area of the municipality. The plaintiffs, appellants here, are Negroes. They brought a class suit in the District Court for the Middle District of Alabama against the Mayor, the members of the City Council and the Chief of Police of the City of Tuskegee, and the members of the Board of Revenue, the Sheriff, and the Judge of Probate of Macon County, and the City of Tuskegee, alleging that as a result of the realignment of the boundaries most of the Negroes who had formerly lived in the City and substantially all of the Negroes who had been qualified to vote in City elections would no longer reside within the City. No white person residing in the City as previously constituted was excluded from it by the Act. The named plaintiffs, Negroes who had resided within the City limits as they formerly existed but beyond those limits as they are redefined by the statute, for themselves and others of such class, assert in their complaint that they have been deprived of police protection and street improvements, and have been denied the right to vote in municipal elections and participate in the municipal affairs of Tuskegee. It was averred that the purpose of the passage of the statute was to deny and deprive the plaintiffs of the right of franchise and other rights and privileges of citizenship of the City of Tuskegee.

By the prayer of the complaint the plaintiffs asked for a declaration that the Legislative Act, as applied to the plaintiffs, is in violation of the due process and equal protection clauses of the Fourteenth Amendment and of the

Fifteenth Amendment. Temporary and permanent injunctions were sought to restrain the defendants from enforcing the statute as to the plaintiffs and those similarly situated, and from denying them the right to participate in municipal elections and to be recognized and treated as citizens of the City of Tuskegee. The defendants filed a motion to dismiss upon the grounds, variously stated, that the courts of the United States cannot inquire into the purpose of enacting or interfere with the carrying out of State legislation fixing the boundaries of municipalities within the State; and that the suit was, in substance, one against the State of Alabama which these plaintiffs could not maintain. The district court granted the motion to dismiss and in its opinion discussed the questions presented, and thus stated its conclusions:

> "Thus this Court must now conclude that regardless of the motive of the Legislature of the State of Alabama and regardless of the effect of its actions, in so far as these plaintiffs' right to vote in the municipal elections is concerned, this Court has no authority to declare said Act invalid after measuring it by any yardstick made known by the Constitution of the United States. This Court has no control over, no supervision over, and no power to change any boundaries of municipal corporations fixed by a duly convened and elected legislative body, acting for the people in the State of Alabama."

The Court entered a judgment dismissing the action upon the ground that the complaint failed to state a claim against the defendants upon which relief could be granted, and for lack of jurisdiction. From this judgment the plaintiffs have appealed.

A general statement of the powers of States over municipal corporations has been made in these words:

> "The creation of municipal corporations, and the conferring upon them of certain powers and subjecting them to corresponding duties, does not deprive the legislature of the State of that general control over their citizens which was before possessed. It still has authority to amend their charters, enlarge or diminish their powers, extend or limit their boundaries, consolidate two or more into one, overrule their legislative action whenever it is deemed unwise, impolitic or unjust, or even abolish them altogether in the legislative discretion, and substitute those which are different. The rights and franchises of such a corporation, being granted for the purposes of government, can never become such vested rights as against the State that they cannot be taken away; nor does the charter constitute a contract in the sense of the constitutional provision which prohibits the obligation of contracts being violated. * * * Restraints on the legislative power of control must be found in the constitution of the State, or they must rest alone in the legislative discretion. If the legislative action in these cases operate injuriously to the municipalities or to individuals, the remedy is not with the courts. The courts have no power to interfere, and the people must be looked to, to right through the ballot-box all these wrongs." 1 Cooley's Constitutional Limitations, 8th Ed. 393 et seq.

To this rule Professor Cooley notes exceptions but none are here pertinent. A portion of the language above has been quoted with approval by the Supreme Court. *Mount*

Pleasant v. *Beckwith*, 100 U. S. 514, 529, 25 L. Ed. 699. With fewer words it has been said:

> "The power to create or establish municipal corporations, to enlarge or diminish their area, to reorganize their governments or to dissolve or abolish them altogether is a political function which rests solely in the legislative branch of the government, and in the absence of constitutional restrictions, the power is practically unlimited." 37 Am. Jur. 626, Municipal Corporations, § 7.

In an often cited opinion the Supreme Court has thus pronounced governing principles:

> "Municipal corporations are political subdivisions of the state, created as convenient agencies for exercising such of the governmental powers of the state as may be intrusted to them. For the purpose of executing these powers properly and efficiently they usually are given the power to acquire, hold, and manage personal and real property. The number, nature, and duration of the powers conferred upon these corporations and the territory over which they shall be exercised rests in the absolute discretion of the state. Neither their charters, nor any law conferring governmental powers, or vesting in them property to be used for governmental purposes, or authorizing them to hold or manage such property or exempting them from taxation upon it, constitutes a contract with the state within the meaning of the Federal Constitution. The state, therefore, at its pleasure, may modify or withdraw all such powers, may take without compensation such property, hold it itself, or vest it in other agencies, expand or contract the territorial area, unite the whole or a part of it with another municipality, repeal the charter and destroy the

corporation. All this may be done, conditionally or unconditionally, with or without the consent of the citizens, or even against their protest. In all these respects the state is supreme, and its legislative body, conforming its action to the state Constitution, may do as it will, unrestrained by any provision of the Constitution of the United States. Although the inhabitants and property owners may, by such changes, suffer inconvenience, and their property may be lessened in value by the burden of increased taxation, or for any other reason, they have no right, by contract or otherwise, in the unaltered or continued existence of the corporation or its powers, and there is nothing in the Federal Constitution which protects them from these injurious consequences. The power is in the state, and those who legislate for the state are alone responsible for any unjust or oppressive exercise of it." *Hunter* v. *Pittsburgh*, 207 U. S. 161, 28 S. Ct. 40, 52 L. Ed. 151. See *Pawhuska* v. *Pawhuska Oil Co.*, 250 U. S. 394, 39 S. Ct. 526, 63 L. Ed. 1054; *City of Trenton* v. *New Jersey*, 262 U. S. 182, 43 S. Ct. 534, 67 L. Ed. 937, 29 A.L.R. 1471.

In a leading Florida case it is stated:

"The existence of the power [of a State legislature to establish, alter, extend, or contract municipal boundaries] is freely conceded. But is that power unlimited, and the exercise of it entirely beyond the reach of judicial review in any and all cases? The weight of authority in this country seems to answer this question in the affirmative, and to hold that the legislative power in this regard is practically plenary and unlimited, in the absence of express constitutional restriction thereof." *State ex rel. Davis* v. *City of Stuart*, 97 Fla. 69, 120 So. 335, 64 A.L.R. 1307.

It is a general rule that the "power of increase and diminuti[on] of municipal territory is plenary, inherent and discretionary in the Legislature, and, when duly exercised, cannot be revised by the courts." Cooley on Municipal Corporations 106 § 32. See 16 C.J.S. 706, Constitutional Law. § 145; Cooley's Constitutional Limitations, *supra*; *State ex rel. Davis* v. *City of Stuart*, *supra*.

It is not claimed that any provision of the State Constitution is violated. The Alabama Constitution expressly recognizes the legislative power of "altering or enlarging the boundaries" of municipalities. Ala. Const. Sec. 104 (18); *Ensley* v. *Simpson*, 166 Ala. 366, 52 So. 61; *State* v. *Gullatt*, 210 Ala. 452, 98 So. 373. Should it be contended that a state constitutional question is presented, such contention should not be submitted, in the absence of diversity of citizenship, to Federal tribunals. We find no necessity to declare the rule that a state legislature may do as it will in altering municipal boundaries unrestrained by any provision of the Federal Constitution to be a rule without exception. We think this case does not present the exception. We need not say, for our purposes here, that there may not be cases where courts can properly inquire as to whether a statute fixing boundaries transcends constitutional limits. We think this is not such a case.

Judicial interposition will be sustained where general obligation municipal bonds have been issued and thereafter a change in boundaries has diminished the extent and value of the property subject to tax liens for servicing the bond issue. In such a case the Federal Constitution prevents the contract obligation of the bonds from being impaired by the reduction of the security pledged for their payment. However, the statute contracting the area is not to be declared void. The City's area would be reduced but the City would have a continuing right and be under a continuing duty to levy taxes upon the territory outside, but which was formerly within, its limits as well as upon its remaining area to provide revenue to meet the matur-

ities of interest and principal on the bonds. *Mobile* v. *Watson*, 116 U. S. 289, 6 S. Ct. 398, 29 L. Ed. 620. Cf. *City of Sour Lake* v. *Branch*, 5th Cir. 1925, 6 F. 2d 355, cert. den. 269 U. S. 565, 46 S. Ct. 24, 70 L. Ed. 414; *Town of Oneida* v. *Pearson Hardwood Flooring Co.*, 169 Tenn. 449, 88 S. W. 2d 998; 1 Quindry, Bonds and Bondholders 744 § 529.

The members of a municipal corporation, its citizens, are those residing within the municipal boundaries. They and all of them, but none others, are entitled to the benefits, privileges and immunities and they are subject to the burdens and liabilities of the municipalities. Property within an incorporated city or town is subject to taxation by the corporation. So also, as has been observed, land excluded may be subjected to taxation by the municipality to prevent impairment of a contract obligation. Sojourners must comply with the City's police regulations. When a person removes from a municipal corporation he loses his membership and the rights incident to such membership and this is no less true where the removal is involuntary and results from a change of boundaries than where the resident removes to another place. That this is so does not restrict the legislative power to alter municipal boundaries.

It is said by Mr. Justice Jackson, a "fundamental tenet of judicial review that not the wisdom or policy of legislation but only the power of the legislature, is a fit subject for consideration by the courts." Jackson, Struggle for Judicial Supremacy 81. See *Hunter* v. *Pittsburgh*, *supra*. In the consideration of statutes the courts will refrain from making inquiry into the motives of the legislature, and will not be influenced by the opinions of any or all the members of the legislature, or of its committees or of any other person. 82 C. J. S. 745-746, Statutes § 354. It has recently been stated that "In testing constitutionality we cannot undertake a search for motive. If the State has the power to do an act, its intention or the reason by which it

is influenced in doing it cannot be inquired into." *Shuttlesworth* v. *Birmingham Board of Education*, D. C. N. D. Ala. 1958, 162 F. Supp. 372, aff. 358 U. S. 101, 79 S. Ct. 221, 3 L. Ed. 2d 145. An attack was made in the Tennessee courts upon an act of the legislature of that State which altered the boundaries of the City of Nashville. The plaintiffs charged that, among other things, the boundaries were arbitrarily drawn with irregular lines and numerous angles which subjected plaintiffs' property to municipal taxation while excluding other property similarly situated it violation of the due process constitutional provisions. It was alleged that the act was conceived and its passage procured for sinister motives for the purpose of assessing the property of the plaintiffs and excluding the property of others, and this was done pursuant to an agreement between the persons benefited and a few members of the legislature. In holding the allegations insufficient the court said:

> "That a bill is inspired by private persons for their own advantage and to the detriment of others is clearly not a sufficient reason for holding the law void, when passed. Nor can the courts annul a statute because the legislature passing it was imposed upon and misled by a few of its members in conjunction with interested third parties. If the act in question is unwise and oppressive, the bill may be remedied by repeal or amendment. The courts have nothing to do with the policy of legislation nor the motives with which it is made." *Williams* v. *City of Nashville*, 89 Tenn. 487, 15 S. W. 364.

In a case where an issue was presented not wholly dissimilar to that before us, an attack was made on the County Unit System of voting that prevails in Georgia. It was asserted, among other things, that the statute providing for the "System" was unconstitutional because it had the "present effect and purpose of preventing the

Negro and organized labor and liberal elements of urban communities, including Fulton County, from having their votes effectively counted in primary elections." It was held by a Three-Judge District Court that the Federal Constitution does not take from states the right to set up their own internal organizations and prescribe the manner of state elections. *South* v. *Peters*, D.C.N.D.Ga. 1950, 89 F. Supp. 672. The Supreme Court affirmed, although a dissenting opinion took the view that the statute abridged the right to vote on account of color in violation of the Fifteenth Amendment. *South* v. *Peters*, 339 U. S. 276, 70 S. Ct. 641, 94 L. Ed. 834, reh. den. 339 U. S. 959, 70 S. Ct. 980, 94 L. Ed. 1369.

The enactment by a state legislature of a statute creating, enlarging, diminishing or abolishing a municipal corporation is, as has been noted, a political function. It is a governmental act. *American Bemberg Corporation* v. *City of Elizabethton*, 180 Tenn. 373, 175 S. W. 2d 535. Hence it is an act of sovereignty performed under a power reserved by the Tenth Amendment, 81 C.J.S. 858, States § 2. This universally recognized sovereign power should not be restricted by prohibiting its exercise where, as an incidence of it, Negroes would be purposely excluded from the municipality and from participation in its affairs.

Our consideration of what we regard to be the applicable rules of law leads us to the conclusion that, in the absence of any racial or class discrimination appearing on the face of the statute, the courts will not hold an act, which decreases the area of a municipality by changing its boundaries, to be invalid as violative of the Fourteenth and Fifteenth Amendments to the United States Constitution, although it is alleged that the enactment was made for the purpose, not appearing in the Act, and with the effect of excluding or removing Negroes from the City and depriving them of the privileges and benefits of municipal membership, including the right to vote in City elections. Since we have reached this conclusion, it follows that the judgment of the district court must be

AFFIRMED.

BROWN, Circuit Judge, Dissenting.

WISDOM, Circuit Judge, Concurring Specially.

BROWN, Circuit Judge, dissenting:

Feeling that this decision is wrong, I cannot presume to speak for the Court. But in sounding this respectful dissent from the action of my Brothers who are no less sensitive than I to the compelling obligations of the Constitution, I would suggest that the Court itself is troubled by this decision.

Does the Court really mean to apply the absolute of *Hunter* v. *Pittsburgh*, 207 U. S. 161? It is sweeping and unequivocal:

> "In all these respects the state is supreme, and its legislative body, conforming its action to the state Constitution, may do as it will, unrestrained by any provision of the Constitution of the United States."

If this is the law, then why does not the opinion end with it? Why does the Court disavow any purpose to hold that it is a rule without exception?[1]

Does the Court really determine that the question of alteration of municipal boundaries is a "political" matter and hence beyond the scrutiny of the Judiciary? If it means this, then why does it emphasize time and again that the discriminatory purpose does not appear on the *face* of

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[1] "We find no necessity to declare the rule that a state legislature may do as it will in altering municipal boundaries unrestrained by any provision of the Federal Constitution to be a rule without exception. We think this case does not present the exception. We need not say, for our purposes here, that there may not be cases where courts can properly inquire as to whether a statute fixing boundaries transcends constitutional limits. We think this is not such a case."

the Alabama Act? If it is a "political" matter beyond judicial scrutiny, then what difference does it make whether the purpose is frankly stated or stealthfully concealed by artful sophistication?[2]

Does the Court mean to recognize that where the purpose of the Act is patent on its face the constitutional guaranty or prohibition is then sufficient to invest the Judiciary with a power to so declare by an effective order? If the Judiciary has the power to strike down what is plainly forbidden, what is there about the nature of the judicial process, traditional notions of separation of powers, or the doctrine of judicial abstention from "political" matters, that robs the Judiciary of its accustomed role of inquiry and ascertainment of legislative purpose?

I do not find the answers to these questions in the Court's opinion. I believe earnestly that analysis will demonstrate that satisfactory answers may not be found either to them, or to others suggested by them. Like analysis will show, I think, that the courts are open to hear and determine the serious charge here asserted.

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[2] As much is implied by the Court's statement:

"The enactment by a state legislature of a statute creating, enlarging, diminishing or abolishing a municipal corporation is, as has been noted, a political function. It is a governmental act. American Bemberg Corporation v. City of Elizabethton, 180 Tenn. 373, 175 S. W. 2d 535. Hence it is an act of sovereignty performed under a power reserved by the Tenth Amendment. 81 C. J. S. 858, States § 2. This universally recognized sovereign power should not be restricted by prohibiting its exercise where, as an incidence of it, Negroes would be purposely excluded from the municipality and from participation in its affairs."

The last sentence indicates that *purposeful* exclusion of Negroes has a "sovereign" or "political" immunity regardless of its patent or latent genesis.

I.

Unlike the inherent ambiguity of a phrase like "due process" or "equal protection" found in the immediately preceding Fourteenth Amendment, the 34 words comprising the Fifteenth Amendment are plain. Their command is clear:

> "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude."

The idea, implicit in the Court's opinion that being a "political" matter the sanction of the constitutional guaranty is to be found in the self-imposed sense of responsibility of the individual states—here Alabama—is a denial of history.

> "A few years experience satisfied the thoughtful men who had been the authors of the other two Amendments that, notwithstanding the restraints of those articles on the states, and the laws passed under the additional powers granted to Congress, these were inadequate for the protection of life, liberty and property, without which freedom to the slave was no boon. They were in all those states denied the right of suffrage. The laws were administered by the white man alone. It was urged that a race of men distinctively marked as was the negro, living in the midst of another and dominant race, could never be fully secured in their person and their property without the right of suffrage.
>
> "Hence the 15th Amendment, which declares that 'the right of a citizen of the United States to vote shall not be denied or abridged by any state on account of race, color, or previous condition of servitude.' The negro having, by the 14th Amendment, been declared to be a citizen of the United States, is thus made a voter in every state of the Union.

> "We repeat, then, in the light of this recapitulation of events, almost too recent to be called history, but which are familiar to us all; and on the most casual examination of the language of these amendments, no one can fail to be impressed with the one pervading purpose found in them all, lying at the foundation of each, and without which none of them would have been even suggested; we mean the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly made freemen and citizen from the oppression of those who had formerly exercised unlimited dominion over him. It is true that only the 15th Amendment, in terms, mentions the negro by speaking of his color and his slavery. But it is just as true that each of the other articles was addressed to the grievances of that race, and designed to remedy them as the fifteenth." *The Butchers' Benevolent Ass'n* v. *The Crescent City Live-Stock Landing and Slaughter-House Co.* (Slaughter-House Cases), 1873, 83 U. S. (16 Wall.) 36, 71-72, 21 L. Ed. 394.

Tested in this light, these statements of the District Court are compelling indeed. As he declared, in dismissing Appellants' complaint,

> "Prior to the passage of Act No. 140, the boundaries of the municipality of Tuskegee formed a square, and, according to the complaint * * * contained approximately 5,397 Negroes, of whom approximately 400 were qualified as voters in Tuskegee, and contained approximately 1,310 white persons, of whom approximately 600 were qualified voters in said municipality. As the boundaries are redefined by said Act No. 140, the municipality of Tuskegee resembles a 'sea dragon.' The effect of the Act is to remove from the municipality of Tuskegee all but

> four or five of the qualified Negro voters and none of the qualified white voters. Plaintiffs state that said Act is but another device in a continuing attempt to disenfranchise Negro citizens not only of their right to vote in municipal elections and participate in municipal affairs, but also of their right of free speech and press, on account of their race and color." *Gomillion* v. *Lightfoot*, M. D. Ala., 1958, 167 F. Supp. 405, 407.

The conclusion and judgment of the District Court, which we have this day affirmed, is "that the complaint fails to state a claim * * * upon which relief can be granted and that this Court does not have any authority or jurisdiction to declare void this particular duly enacted statute of the State of Alabama."[3] 167 F. Supp. 405, 410. Accordingly, the case must now be measured against the allegations of the complaint which categorically charges purposeful discrimination for race. For, as we have learned from *Conley* v. *Gibson*, 1957, 355 U. S. 41, 45-46, 78 S. Ct. 99, 2 L. Ed. 2d 80, "In appraising the sufficiency

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[3] The District Court puts it squarely on the basis that the "court does not have any authority or jurisdiction." Another thing still unclear in this Court's opinion is whether it takes a like view or whether, in the expression "the courts will not *hold* an act * * * to be invalid * * *", this Court is to be understood as recognizing that it has the power to review—and exercising it—affirmatively finds the act within the constitutional prerogative of Alabama. The Court expresses its conclusion this way:

> "Our consideration of what we regard to be the applicable rules of law leads us to the conclusion that, in the absence of any racial or class discrimination appearing on the face of the statute, the courts will not hold an act, which decreases the area of a municipality by changing its boundaries, to be invalid as violative of the Fourteenth and Fifteenth Amendments to the United States Constitution, although it is alleged that the enacement was made for the purpose, not appearing in the Act, and with the effect of excluding or removing Negroes from the City and depriving them of the privileges and benefits of municipal membership, including the right to vote in City elections."

of the complaint we follow, of course, the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set facts in support of his claim which would entitle him to relief." And for this purpose the complaint must be taken as true. *Glus* v. *Brooklyn Eastern District Terminal*, 1959, —U. S.—, —S. Ct.—, 3 L. Ed. 2d 770, 774.

Considering the procedural context in which this case now finds itself, the Court has permitted the Legislature of Alabama to simply abolish a substantial part of one of its cities, Tuskegee, and thereby disenfranchise all but four or five of its Negro citizens. Almost as anticipating the existence of this invincible power, the legislature is perhaps presently considering using it to eradicate the entire County of Macon.[4]

II.

Although to me this is an apt illustration of "burn[ing] the house to roast the pig,"[5] I agree with much of that said by the Appellees, the District Judge and the majority of this Court. Zoning and districting regulations are primarily for states. Voting regulations are primarily for states. As a general rule, the Constitution of the United States, the Congress, the Federal Courts, and the Executive Branch of the Federal Government are not concerned with such local matters.

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[4] An amendment to the Alabama Constitution providing that the legislature "may * * * by a majority vote of each house, enact general or local laws * * * reducing the area of, or abolishing, Macon County * * * *" was introduced and passed by the 1957 session of the Alabama Legislature as Act No. 526. It was subsequently submitted to a referendum, and approved, December 17, 1957. The Act is reported at 3 Race Rel. L. Rep. 357 (1958).

[5] Butler v. Michigan, 1957, 352 U. S. 380, 383, 77 S. Ct. 524, 1 L. Ed. 2d 412 (per Frankfurter, J.).

This is not to say, however, as the Court's opinion tends to conclude from the *Hunter, Beckwith* and *Laramie* cases,[6] that the Constitution imposes *no* limitation upon the actions of the states in these areas.

It is axiomatic that in a federal system the laws of the individual states cannot be supreme. For even in a field reserved expressly to the States or to the people it is the Constitution which assures that. The Constitution so prescribes. Article Six of the Constitution provides that "This Constitution * * * shall be the supreme Law of the Land; * * * any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." Moreover, Alabama, like most states, requires that "All members of the legislature, and all officers, executive and judicial, before they enter upon the execution of the duties of their respective offices * * *" must swear to "support the Constitution of the United States * * *." Ala. Const. Art. 16, § 279 (1901).

The nearly 360 volumes of the United States Reports are full of the historical story of the occasional conflict between what are in all other respects matters of wholly local concern, and some provision of the Constitution. Needless to say, whenever true conflict has in fact existed, the Constitution has always won out. There is no local matter which is not subject to potential examination for Constitutional defects. To list them all is the task of a case digest or encyclopedia, not a judicial opinion. But a few examples are helpful to illustrate the broad spectrum of constitutional concern.

A mere cursory examination of the following areas will show that they are all typically thought of as matters of nearly exclusive local control. And yet the footnotes indicate some of the familiar cases in which it was determined

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[6] Hunter v. Pittsburgh, 1907, 207 U. S. 161, — S. Ct. —, 52 L. Ed. 151; Mount Pleasant v. Beckwith, 1880, 100 U. S. 514, — S. Ct. —, 35 L. Ed. 699; Comm'rs of Laramie County v. Comm'rs of Albany County, 1876, 92 U. S. 307, — S. Ct. —, 23 L. Ed. 552. 167 F. Supp. 405, 408-409.

that, for some reason, the state or local government's treatment was weighed and found constitutionally wanting: local education,[7] transportation,[8] and recreation[9] facilities; athletic contests control;[10] local housing developments;[11] state taxation[12] and educational institutions;[13] what are essentially state judicial procedure matters like admission

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[7] Cooper v. Aaron, 1958, — U. S. —, — S. Ct. —, 3 L. Ed. 2d 3, 5, 17 (Little Rock); Brown v. Board of Education, 1954, 347 U. S. 483, 74 S. Ct. 686, 98 L. Ed. 873, Anno. 98 L. Ed. 882, 38 A. L. R. 2d 1180; supplemental opinion, 1955, 349 U. S. 294, 75 S. Ct. 753, 99 L. Ed. 1083; also companion case, Bolling v. Sharpe, 1954, 347 U. S. 497, 74 S. Ct. 693, 98 L. Ed. 884 (the original "school segregation cases").

[8] Gayle v. Browder, 1956, 352 U. S. 903, 77 S. Ct. 145, 1 L. Ed. 2d 114, affirming per curiam, M. D. Ala., 1956, 142 F. Supp. 707 (Montgomery busses).

[9] Beal v. Holcombe, 5 Cir., 1951, 193 F. 2d 384, cert. denied, 1954, 347 U. S. 974, 74 S. Ct. 783, 98 L. Ed. 1114 (golf course); City of Ft. Lauderdale v. Moorhead, 5 Cir., 1957, 248 F. 2d 544, affirming per curiam, S. D. Fla., 1957, 152 F. Supp. 131 (same); New Orleans City Park Improvement Assn. v. Detiege, 5 Cir., 1958, 252 F. 2d 122 (Park); Kansas City v. Williams, 8 Cir., 1953, 205 F. 2d 47, affirming, W. D. Mo., 1952, 104 F. Supp. 848, cert. denied, 1953, 346 U. S. 826, 74 S. Ct. 45, 98 L. Ed. 351 (swimming pool).

[10] State Athletic Comm. v. Dorsey, 1959, — U. S. —, — S. Ct. —, — L. Ed. 2d — [May 25, 1959, 27 L. W. 3337], affirming per curiam, E. D. La., 1959, — F. Supp. — [Judge Wisdom, 27 L. W. 2289] (statute barring interracial athletic contests).

[11] Banks v. Housing Authority of San Francisco, —, 120 Cal. App. 2d 1, 260 P. 2d 668, cert. denied, 1954, 347 U. S. 974, 74 S. Ct. 784, 98 L. Ed. 1114 (public low rent housing).

[12] Spector Motor Service, Inc. v. O'Connor, 1951, 340 U. S. 602, — S. Ct. —, 95 L. Ed. 573.

[13] Sweatt v. Painter, 1950, 339 U. S. 629, 70 S. Ct. 848, 94 L. Ed. 1114 (law school); Missouri ex rel. Gaines v. Canada, —, 305 U. S. 337, 59 S. Ct. 232, 83 L. Ed. 208 (same).

to the state bar,[14] appointment of counsel,[15] enforcement of restrictive covenants,[16] payment of filing fees[17] and furnishing of transcripts[18] for appeal, and the selection of jurors;[19] and even a governor's control of his state's militia,[20] and control of highway safety.[21]

One would be hard-pressed to find an area of "exclusive state action" which has or could not, in some way, by legislative design or administrative execution, be found to be violative of some constitutional provision. This has nothing to do with the occasional strife surrounding overlapping congressional and state legislation. No one here contends that Congress has the right to redistrict Tuskegee or prescribe the qualifications for voting in its municipal elections. But the fact that these are solely, or primarily, the initial concerns of Alabama alone does not mean that when it acts it may act without regard for the Constitution.

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[14] Konigsberg v. State Bar of California, 1957, 353 U. S. 252, 77 S. Ct. 722, 1 L. Ed. 2d 810; Schware v. Board of Bar Examiners, 1957, 353 U. S. 232, 77 S. Ct. 752, 1 L. Ed. 2d 796.

[15] Powell v. Alabama, 1932, 287 U. S. 45, — S. Ct. —, 77 L. Ed. 158.

[16] Barrows v. Jackson, 1953, 346 U. S. 249, 73 S. Ct. 1031, 97 L. Ed. 1586, Anno. 97 L. Ed. 1602; Shelly v. Kraemer, 1948, 334 U. S. 1, 68 S. Ct. 836, 92 L. Ed. 1161, 3 A. L. R. 2d 441.

[17] Burns v. Ohio, 1959, — U. S. —, —S. Ct. —, 3 L. Ed. 2d — [June 15, 1959].

[18] Griffin v. Illinois, 1956, 351 U. S. 12, 76 S. Ct. 585, 100 L. Ed. 891.

[19] Cassell v. Texas, 1950, 339 U. S. 282, — S. Ct. —, 94 L. Ed. 839; Smith v. Texas, 1940, 311 U. S. 128, — S. Ct. —, 85 L. Ed. 84; United States ex rel. Goldsby v. Harpole, 5 Cir., 1959, 263 F. 2d 71.

[20] Sterling v. Constantin, 1932, 287 U. S. 378, — S. Ct. —, 77 L. Ed. 375; and see Cooper v. Aaron, note 7, supra.

[21] Bibb v. Navajo Freight Lines, 1959, — U. S. —, 79 S. Ct. —, 3 L. Ed. 2d 1003 (truck mud guard regulations).

The Supreme Court expressed the standard in *Cooper* v. *Aaron*, note 7, *supra*, when they said,

> "It is, of course, quite true that the responsibility for public education is primarily the concern of the States, but it is equally true that such responsibilities, *like all other state activity*, must be exercised consistently with federal constitutional requirements as they apply to state action." (emphasis supplied). 358 U. S. —at— [3 L. Ed. 2d 5 at 17].

Of course, the same thing could be said of state regulation of voting and zoning.

In *Sterling* v. *Constantin*, note 20, *supra*, the Supreme Court was confronted with the contention that,

> "• • • the Governor's order had the quality of a supreme and unchallengeable edict, overriding all conflicting rights of property and unreviewable through the judicial power of the Federal Government." 287 U. S. 378 at 397.

A contention, it might be noted, which is not altogether dissimilar from that advanced here as to the omnipotence of the Alabama legislature. The assertion was quickly disposed of by the Court in the very next sentence.

> "If this extreme position could be deemed to be well taken, it is manifest that the fiat of a state Governor, and not the Constitution of the United States, would be the supreme law of the land; that the restrictions of the Federal Constitution upon the exercise of state power would be but impotent phrases, • • •." Id., at 397-98.

III.

Nothing in the *Hunter*, *Beckwith* and *Laramie* municipal redistricting cases, note 6, *supra*, primarily relied upon by the majority and the District Court, alters this view.

Indeed, in those very cases the Supreme Court acknowledged that *some* limitations were to be imposed upon the state's action.

> "Text writers concede *almost* unlimited power to the State Legislatures in respect to the division of towns and the alteration of their boundaries, but they all agree that in the exercise of these powers they cannot defeat the rights of creditors nor impair the obligation of a valid contract. [citations]
>
> "Concessions of power to municipal corporations are of high importance; but they are not contracts, and, consequently, are subject to legislative control without limitation, *unless the Legislature oversteps the limits of the Constitution.*" (emphasis supplied).
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> *Mount Pleasant* v. *Beckwith*, note 6, *supra*, 100 U. S. 514, 533.

Moreover, they are not recent cases. Only one was decided in the Twentieth Century, and that over 50 years ago. Racial discrimination was in no way involved. The problems involved concerned property: higher taxes for the annexed city (Hunter), and the liability of a newly created county for the extinguished county's debts (Beckwith and Laramie). Extravagant dicta, taken out of its proper context, that "the state is supreme, and its legislative body, conforming its action to the state Constitution, may do as it will, unrestrained by any provision of the Constitution of the United States"[22] should not now be spread, some 52 years later, to cover and control our

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[22] Hunter v. Pittsburgh, note 6, supra, 207 U. S. 161, 179.

determination of issues of a different area, and of another era.[23]

IV.

Of course it is true that there are many and varied areas of potential controversy which the courts have held to be, for one reason or another, beyond the limits of judicial relief. These include, for example, the constitutional "guarantee to every State in this Union a Republican Form of Government"[24] (Art. IV, § 4), the congressional

[23] I make no apologies for the view that the business of judging in constitutional fields is one of searching for the spirit of the Constitution in terms of the present as well as the past, not the past alone. I find respectable authority in the words of Chief Justice Hughes in Home Building & Loan Association v. Blaisdell, 290 U. S. 398, 442, — S. Ct. —, 78 L. Ed. 413:

> "It is no answer to say that this public need was not apprehended a century ago, or to insist that what the provision of the Constitution meant to the vision of that day it must mean to the vision of our time. If by the statement that what the Constitution meant at the time of its adoption it means today, it is intended to say that the great clauses of the Constitution must be confined to the interpretation which the framers, with the conditions and outlook of their time, would have placed upon them, the statement carries its own refutation. It was to guard against such a narrow conception that Chief Justice Marshall uttered the memorable warning—'We must never forget that it is *a Constitution* we are expounding' (McCulloch v. Maryland, 4 Wheat 316 407)—'A Constitution intended for ages to come, and consequently, to be adapted to the various crises of human affairs.' * * *. When we are dealing with the words of the Constitution, said this Court in Missouri v. Holland, 252 U. S. 416, 433, 'We must realize that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters * * *.' The case before us must be considered in the light of our whole experience and not merely in that of what was said a hundred years ago."

[24] Pacific States Telephone & Telegraph Co. v. Oregon, 1912, 223 U. S. 118, — S. Ct. —, 56 L. Ed. 377; Taylor v. Beckham, 1900, 178 U. S. 548, — S. Ct. —, 44 L. Ed. 1187; Luther v. Borden, 1849, 48 U. S. (7 How.) 1, 42, 12 L. Ed. 581.

regulation of Indian tribes,[25] the legislative and executive control of foreign relations, recognition of foreign governments, and the war powers,[26] control of civilian and military appointing power,[27] or for that matter, the inherent *wisdom* of any executive or legislative policy or specific action,[28] as, for example, taxation.[29]

An outstanding illustration is the Supreme Court's traditional reluctance to grant taxpayers relief against governmental action. As that Court declared in *Massachusetts* v. *Mellon*, 1923, 262 U. S. 447, 487, 488, —S. Ct.— 67 L. Ed. 1078, regarding a citizen's attack upon a federal appropriation bill,

> "His interest in the moneys of the Treasury • • • is shared with millions of others • • •. • • • If one taxpayer may champion and litigate such a cause, then every other taxpayer may do the same, not only in respect to the statute here under review, but also in respect of every other appropriation act and statute whose administration requires the outlay of

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[25] Lone Wolf v. Hitchcock, 1903, 187 U. S. 553, 565, — S. Ct. —, 47 L. Ed. 299.

[26] Harisiades v. Shaughnessy, 1952, 342 U. S. 580, 588-89, 72 S. Ct. 512, 96 L. Ed. 586; Hirabayashi v. United States, 1943, 320 U. S. 81, 93, — S. Ct. —, 87 L. Ed. 1774; United States v. Curtiss-Wright Export Corp., 1936, 299 U. S. 304, — S. Ct. —, 81 L. Ed. 255; Oetjen v. Central Leather Co., 1918, 246 U. S. 297, 302, — S. Ct. —, 62 L. Ed. 726; Neely v. Henkel, 1901, 180 U. S. 109, — S. Ct. —, 45 L. Ed. 448; Kennett v. Chambers, 1852, 55 U. S. (14 How.) 38, 50-51, 14 L. Ed. 316.

[27] Orloff v. Willoughby, 1953, 345 U. S. 83, 90, 73 S. Ct. 534, 97 L. Ed. 842.

[28] Trop v. Dulles, 1958, 356 U. S. 86, 114, 120, 78 S. Ct. 590, 2 L. Ed. 2d 630 (dissenting opinion).

[29] Massachusetts v. Mellon, 1923, 262 U. S. 447, 487-88, — S. Ct. —, 67 L. Ed. 1078.

public money, and whose validity may be questioned. The bare suggestion of such a result, with its attendant inconveniences, goes far to sustain the conclusion which we have reached, that a suit of this character cannot be maintained. • • • The party who invokes the power [of courts to declare acts unconstitutional] must be able to show not only that the statute is invalid, but that he • • • is immediately in danger of sustaining some direct injury as the result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally."

Such reasoning is hardly applicable here. Appellants' complaint is not one "in common with people generally" —only those whose skin is black. And their suffering is not indefinite: one day voting citizens of Tuskegee, the next they have been deprived of both vote and village.

Nor do the two voter cases applying judicial abstention because the cases were political in nature either justify or compel a different result.

In *Colegrove v. Green*, 1946, 328 U. S. 549, —S. Ct.—, 90 L. Ed. 1432, Illinois citizens sought a redistricting of the state because of the gross inequality inherent in a range of population in congressional districts of from 112,116 to 914,000. The Court affirmed the dismissal of the complaint "because due regard for the effective working of our Government revealed this issue to be of a peculiarly political nature, and therefore not meet for judicial determination." 328 U. S. 549, 552. Again, however, this case involved no consideration of racial issues. The conflict was between rural and urban Illinois, or political parties, not races. And, although some citizens only had one-ninth the vote of others, they were all still permitted to engage in the formality of balloting. It may also be noted that this was not a determination that the districting was constitutional, that the three dissenters felt that the Court should have decided the case, and against the constitutionality of the

districting complained of, that Mr. Justice Rutledge's concurring opinion expressed the view that the Court has the power to provide relief in such cases but that here "the cure sought may be worse than the disease," 328 U. S. 549, 566, and that the opinion has come under some criticism. See, e.g., Lewis Legislative Apportionment and the Federal Courts, 71 Harv. L. Rev. 1057 (1958).

A case of disenfranchisement of Negroes by redistricting has apparently never before arisen. But, as I shall point out in detail, the right of Negroes to vote equally with whites has been jealously guarded by the Supreme Court.

Even in *Breedlove* v. *Suttles*, 1937, 302 U. S. 277, —S. Ct.—, 82 L. Ed. 252, in which the Court found that Georgia's poll tax did not deny any privilege or immunity of the 14th Amendment, the opinion notes that the otherwise complete freedom of a state to "condition suffrage as it deems appropriate" is "restrained by the Fifteenth and Nineteenth Amendments and other provisions of the Federal Constitution . . . ." 302 U. S. 277, 283.

And although the brief per curiam in *South* v. *Peters*, 1950, 339 U. S. 276, —S. Ct.—, 94 L. Ed. 834, affirming the dismissal of a petition attacking Georgia's county unit voting system for primary elections as violative of the Fourteenth and Seventeenth Amendments, harks back to *Colegrove* v. *Green, supra*, and the categorization of "cases posing political issues arising from a state's geographical distribution of electoral strength among its political subdivisions," 339 U. S. 276, 277, it too, does not completely disenfranchise any citizen, is primarily concerned with the urban-rural conflict, and carries a strong dissent, that begins by acknowledging for all, "I suppose that if a State reduced the vote of Negroes, Catholics, or Jews so that each got only one-tenth of a vote, we would strike the law down."

V.

When a racial discrimination voting issue is clearly posed the Court has evidenced little concern for judicial abstention in "cases posing political issues." Mr. Justice Holmes provided this frontal attack for the Court in the "white primary case" of *Nixon* v. *Herndon*, 1927, 273 U. S. 536, 540, 541, —. S. Ct. —, 71 L. Ed. 759 "The objection that the subject-matter of the suit is political is little more than a play upon words. Of course, the petition concerns political action, but it alleges and seeks to recover for private damage. That private damage may be caused by such political action, and may be recovered for in a suit at law, hardly has been doubted for over two hundred years * * *. * * * States may do a good deal of classifying that it is difficult to believe rational, but there are limits, and it is too clear for extended argument that color cannot be made the basis of a statutory classification affecting the right set up in this case." In *Smith* v. *Allwright*, 1944, 321 U. S. 649, — S. Ct. —, 88 L. Ed. 987, the Court acknowledged that, "Texas is free to conduct her elections and limit her electorate as she may deem wise, save only as her action may be affected by the prohibitions of the United States Constitution * * *." 321 U. S. 649, 657, and then went on to note that, "'the Fifteenth Amendment specifically interdicts any denial or abridgement by a state of the right of citizens to vote on account of color,'" (Id.) and found the Texas white primary procedure unconstitutional. Its teaching was applied to strike down the Jaybird Association in *Terry* v. *Adams*, 345 U. S. 461, 72 S. Ct. 809, 97 L. Ed. 1152. Mr. Justice Black reviewed many of the predecessor cases, took note of the fact that the Fifteenth Amendment has been held "self-executing" and declared:

> "The Amendment bans racial discrimination in voting by both state and nation. It thus establishes a national policy, obviously applicable to the right of Negroes not to be discriminated against as voters

in elections to determine public governmental policies or to select public officials, national, state, or local." 345 U. S. at 467.

Not only have the courts uniformly enforced Negro voting rights under the Constitution, but Congress pursuant to the constitutional mandate has for nearly 100 years specifically provided for judicial enforcement of civil rights by legislation.[30] See, e.g., 18 U. S. C. A.

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[30] 18 U. S. C. A. § 241:

"If two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having exercised the same; or

"If two or more persons go in disguise on the highway, or on the premises of another, with intent to prevent or hinder his free exercise of enjoyment of any right or privilege so secured—

"They shall be fined not more than $5,000 or imprisoned not more than ten years, or both."

18 U. S. C. A. § 242:

"Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects any inhabitant of any State, Territory, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States, or to different punishments, pains, or penalties, on account of such inhabitant being an alien, or by reason of his color, or race, than are prescribed for the punishment of citizens, shall be fined not more than $1,000 or imprisoned not more than one year, or both."

18 U. S. C. A. § 243:

Providing that there shall be no discrimination in the selection of jurors and setting a $5,000 fine for violation.

28 U. S. C. A. § 1343:

"The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

"(1) To recover damages for injury to his person or property, or because of the deprivation of any right or privilege of a citizen of the United States, by any act done in furtherance of any conspiracy mentioned in section 1985 of Title 42;

"(2) To recover damages from any person who fails to prevent or to aid in preventing any wrongs mentioned in section 1985 of Title 42 which he had knowledge were about to occur and power to prevent;

§§ 241-243, 28 U. S. C. A. §§ 1343, 1443, 42 U. S. C. A. §§ 1981-1995.

It is of little significance that the Alabama Tuskegee redistricting act under consideration does not, as this Court

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"(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

"(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, *including the right to vote.*" (Emphasis supplied.)

Part (4) added Sept. 9, 1957, 71 Stat. 637. Legislative history reported at 2 U. S. Code Cong. & Ad. News 1966, 1974 (1957).

28 U. S. C. A. § 1443:

"Any of the following civil actions or criminal prosecutions, commenced in a State court may be removed by the defendant to the district court of the United States for the district and division embracing the place wherein it is pending:

"(1) Against any person who is denied or cannot enforce in the courts of such State a right under any law providing for the equal civil rights of citizens of the United States, or of all persons within the jurisdiction thereof;

"(2) For any act under color of authority derived from any law providing for equal rights, or for refusing to do any act on the ground that it would be inconsistent with such law."

42 U. S. C. A. §§ 1981-1995

1981 (equal rights)
1982 (equal property rights)
1983 (action for deprivation of rights)
1984 (reviewable by Supreme Court)
1985 (action for conspiracy to interfere with civil rights)
1986 (action for failure to prevent interference)
1987 (officers may institute proceedings)
1988 (proceedings in conformity with common law)
1989 (additional commissioners)
1990 (penalty for failure to execute warrant)
1991 (provision for $5 fee for arrests)
1992 (President may request more speedy proceedings)
1993 (repealed)
1994 (peonage abolished)
1995 (new; fine and imprisonment for criminal contempt)

so greatly emphasizes, demonstrate on its face that it is directed at the Negro citizens of that community. If the act is discriminatory in purpose and effect, "whether accomplished ingeniously or ingenuously [it] cannot stand." *Smith* v. *Texas*, note 19, *supra*, 311 U. S. 128, 132. Or, as the Court said in *Lane* v. *Wilson*, 1939, 307 U. S. 268, 275 — S. Ct. —, 83 L. Ed. 1281, another case of voting discrimination "The Amendment nullifies sophisticated as well as simple-minded modes of discrimination." Means of disenfranchising Negroes, like fraud, have historically been "as old as falsehood and as versable as human ingenuity." *Weiss* v. *United States*, 5 Cir., 1941, 122 F. 2d 675, 681, cert. denied, 314 U. S. 687, 62 S. Ct. 309, 86 L. Ed. 550. And "in determining whether a provision of the Constitution applies to a new subject matter, it is of little significance that it is one with which the farmers were not familiar." *United States* v. *Classic*, 1941, 313 U. S. 299, 316, — S. Ct. —, 85 L. Ed. 1368.

VI.

The effect of the act is clear. The District Court so found. "As the boundaries are redefined by said Act No. 140 the municipality of Tuskegee resembles a 'sea dragon.' The effect of the Act is to remove from the municipality of Tuskegee all but four or five of the qualified Negro voters and none of the white voters."

Even if the procedural effect of a motion to dismiss for failure to state a claim—admission of allegations—is disregarded the sheer statistics alleged may demonstrate a prima facie purpose of discrimination.

It might well be, as was true in *United States ex rel. Goldsby* v. *Harpole*, 5 Cir., 1959, 263 F. 2d 71, that if Appellants were ever allowed the opportunity of a trial that "the naked figures [would themselves] prove startling enough." 263 F. 2d 71, 78. In that case, involving exclusion of Negroes from juries, the fact that 57% of the popu-

lation of Carroll County, Mississippi was Negro and yet no county official "could remember any instance of a Negro having been on a jury list of any kind," without refutation by the State of the reason for such a result was considered enough to prove systematic exclusion of Negroes from the juries of that county. This was the standard of proof of a prima facie case established by such cases as *Norris* v. *Alabama*, 1935, 294 U. S. 587, 55 S. Ct. 579, 79 L. Ed. 1074, and *Hernandez* v. *Texas*, 1954, 347 U. S. 475, 74 S. Ct. 667, — L. Ed. —. And in *United States* v. *Alabama*, 5 Cir., 1959, — F. 2d — [No. 17684, June 16, 1959], this Court took note of the allegations that in Macon County, Alabama, the fact that 97% of the eligible whites were registered and *only 8% of the 14,000* eligible Negroes resulted in the fact that whites could outvote Negroes nearly three to one and was at least some evidence, if not proof, of discrimination in registration. — F. 2d —, —, n. 3. Perhaps the fact that in the present case the Act in question excludes 99% of the 400 Negro voters from the City of Tuskegee and yet not one single one of the 600 white voters will likewise be considered on the trial as proof enough of the discriminatory and unconstitutional purpose of the Act. But it is again well to point out that the adequacy of the proof in this case is not presently before us as we consider it on the basis of the complaint alone.

VII.

We need not be that "blind" Court that Mr. Chief Justice Taft described as unable to see what "all others can see and understand • • •." *Bailey* v. *Drexel Furniture Co.* [Child Labor Tax Case], 1922, 259 U. S. 20, 37, — S. Ct. —, 66 L. Ed. 817. Cited in *United States* v. *Butler*, 1936, 297 U. S. 1, 61, — S. Ct. —, 80 L. Ed. 477; *United States* v. *Rumely*, 1953, 345 U. S. 41, 44, 73 S. Ct. 543, 97 L. Ed. 770; *Uphaus* v. *Wyman*, 1959, — U. S. —, — S. Ct. —, 3 L. Ed. 2d — (dissenting opinion) [June 8, 1959] [dissent p. 17]. "[T]here is no reason why [we] should

pretend to be more ignorant or unobserving than the rest of mankind." *Affiliated Enterprises* v. *Waller*, Del., —, 5 A. 2d 257, 261. How it can be suggested that we should, for some reason, not make inquiry in this case is a mystery to me. Many cases could be cited but the most recent example will do. A little over a month ago, in deciding *Harrison* v. *NAACP*, 1959, — U. S. —, — S. Ct. —, 3 L. Ed. 2d — [June 8, 1959], the Supreme Court took note of the District Court's findings that the acts there in question were passed "to nullify as far as possible the effect of the decision of the Supreme Court in *Brown* v. *Board of Education*, 347 U. S. 483 • • • as parts of the general plan of massive resistance to the integration of schools of the state under the Supreme Court's decrees." — U. S. —, —, quoting from *NAACP* v. *Patty*, E. D. Va., 1958, 159 F. Supp. 503, 511, 515. The dissenting opinion notes the same findings, — U. S. —, — [slip op. dissent p. 3], and refers to *Guinn* v. *United States*, 1915, 238 U. S. 347, — S. Ct. —, 59 L. Ed. 1340, and the celebrated Alabama case of *Schnell* v. *Davis*, 1949, 336 U. S. 933, — S. Ct. —, 93 L. Ed. 1093, affirming per curiam, S. D. Ala., 1949, 81 F. Supp. 872. The "legislative setting" surrounding the statute in the latter case was also alluded to in another case decided the same day. *Lassiter* v. *Northhampton Election Board*, 1959, — U. S. —, — S. Ct. —, — L. Ed. — [June 8, 1959]. In *Guinn* the Court observed that an Oklahoma "Grandfather Clause" statute could have "no discernible reason other than the purpose to disregard the prohibitions of the [Fifteenth] Amendment," 238 U. S. 347, 363, although the statute did not specifically declare as its purpose the disenfranchisement of Negroes. The District Court opinion in the *Schnell* v. *Davis* case discusses the legislative background of an "understand and explain the Constitution" registration requirement statute for three pages, 81 F. Supp. 872, 878-81, and concludes, at 880, 881:

> "The defendants argue that the Boswell Amendment is not 'racist in its origin, purpose or effect,'

> but, as has already been illustrated, a careful consideration of the conditions existing at the time, and of the circumstances and history surrounding the origin and adoption of the Boswell Amendment and its subsequent application, demonstrate that its main object was to restrict voting on a basis of race or color. That its purpose was such is further illustrated by the campaign material that was used to secure its adoption. * * * We cannot ignore the impact of the Boswell Amendment upon Negro citizens because it avoids mention of race or color; 'to do this would be to shut our eyes to what all others than we can see and understand.' "

And this Court has taken note that such inquiry into motive and purpose was a main theme of the *Davis* case. *Orleans Parish School Board* v. *Bush*, 5 Cir., 1957, 242 F. 2d 156, 165.

Of course, here, as in *Colegrove* v. *Green*, 328 U. S. 549, *supra*, the effect of the statute is not only a demonstration of its purpose but is enough to demonstrate its unconstitutionality standing alone. As Justice Black stated for three members of the Court,

> "Whether that was due to negligence or was a wilful effort to deprive some citizens of an effective vote, the admitted result is that the Constitutional policy of equality of representation has been defeated." 328 U. S. 549, 572.

VIII.

The District Court has quoted, and my Brothers have echoed, language from cases to the effect that legislative motive cannot be inquired into. E.g., *Doyle* v. *Continental Ins. Co.*, 1876, 94 U. S. 535, 24 L. Ed. 148; *Shuttlesworth* v. *Birmingham Board of Education*, D. Ala., 1958, 162 F. Supp. 372. It is necessary to ascertain precisely what they mean by this discussion and quotations. Of course, at this late date, to "overrule" the principle of statutory inter-

pretation would be somewhat like overruling the principle of stare decisis—equally as impossible and undesirable. It is so firmly established—and for so long—that a mere quotation from Corpus Juris Secundum is adequate to make the point.

> "Since the intention of the legislature, embodied in a statute, is the law, the fundamental rule of construction, to which all other rules are subordinate, is that the court shall, by all aids available, ascertain and give effect, unless it is in conflict with constitutional provisions, or is inconsistent with the organic law of the state, to the *intention* or *purpose* of the legislature as expressed in the statute." 82 C. J. S., Statutes § 321 (1953). (emphasis supplied)

What the Legislature of Alabama, as distinguished from its members, *intended* and what the *purpose* of the Legislature, as distinguished from its members, was in the enactment of this law is then a traditional matter for concern to the Judiciary. Obviously the Legislature of Alabama could have had the purpose of discriminating against Negro voters. Many states have had such purpose as the cases discussed in Part V, *supra*, attest. All that *Doyle* can mean is that in the judicial process of ascertaining *legislative* purpose and intention the individual motives [31]

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[31] For an interesting discussion of the distinction between inquiries into legislative "motive" and legislative "purpose" see NAACP v. Patty, E. D. Va., 1958, 159 F. Supp. 503, 515 n. 6, vacated and remanded for consideration by Virginia courts, — U. S. —, — S. Ct. —, — L. Ed. 2d — [No. 127, June 8, 1959].

In ordinary usage the shadings of the three terms are subtle. Webster's New International Dictionary (2d ed. 1954): Purpose: "That which one sets before himself as an object to be attained; the end or aim to be kept in view in any plan, measure, exertion or operation; design; intention." Intention: "A determination to act in a certain way or to do a certain thing; purpose; design; as, an *intention* to go to Rome." Motive: "That within the individual, rather than without, which incites him to action; any idea, need, emotion, or organic state that prompts to an action."

and expression of the individual members is not pertinent. But where the collective purpose and intention of the body is expressly stated or is ascertained on a trial by the exercise of traditional rules of statutory construction in the light of record facts, the judicial ascertainment and declaration of that purpose and intention is not prohibited by the fact that individual legislators, either in legislative chambers or through the press, may have uttered statements of startling candor.

Of course, to say that "If the State has the power to do an act, its intention or the reason by which it is influenced in doing it cannot be inquired into," *Doyle* v. *Continental Ins. Co., supra,* 94 U. S. 535, 541, quoted in *Shuttlesworth* v. *Birmingham Board of Education, supra,* 162 F. Supp. 372, 381, is to beg the question. If the sole and exclusive legislative purpose is to deprive citizens of a state of their constitutional rights then the state does not have "the power to do [that] act." Naturally, once this unconstitutional purpose is ascertained, and it is determined that the act is unconstitutional and beyond the power of a state legislature to enact, then it is unnecessary and unwise to try to find *why* the legislature harbored this purpose, to psychoanalyze them individually or collectively, and to try and verbalize the *motive* which prompted them to action.

This was recognized in *Doyle, supra,* when the Court made this almost self-defeating pronouncement: "The State of Wisconsin * * * is a sovereign State, possessing all the powers of the most absolute government in the world." 94 U. S. 535, 541. That this "most absolute government in the world" was nevertheless subject to some restraints was acknowledged by the parenthetical phrase elipsed purposefully from the quotation just made that "(except so far as its connection with the Constitution and laws of the United States alters its position)" Wisconsin is an absolute sovereign state.

Doyle like *Hunter* is not really then an aid to decision. Each represents only the result once it has been concluded that the particular act does not offend the Constitution. Each is a sweeping generalization, the effect of which would be to supplant all constitutional guaranties if literally applied.

IX.

If the Courts are not open to perform the traditional judicial function of ascertaining *legislative* purpose and intent, then these appellants stand helpless before the law so that, as to the Fifteenth Amendment, in the memorable words of Chief Justice Marshall, "* * * the declaration that the Constitution * * * shall be the supreme law of the land, is empty and unmeaning declamation." *M'Culloch* v. *Maryland*, 4 Wheat 316, 433, 4 L. Ed. 579, 608. The suggestion, implicit if not expressed, that "for protection against abuses by Legislators the people must resort to the polls, not to the Court." *Munn* v. *Illinois*, 1877, 94 U. S. 113, 134, — S. Ct. —, 24 L. Ed. 77; *Williamson* v. *Lee Optical of Oklahoma*, 1955, 348 U. S. 483, 488, 75 S. Ct. 461, 99 L. Ed. 563, is here unavailing.

For there can be no relief at the polls for those who cannot register and vote. Significantly the complaint in this case further alleged: "Macon County had no Board of Registrars to qualify applicants for voter registration for more than eighteen months, from January 16, 1956 to June 3, 1957. Plaintiffs allege that the reason for no Macon County Board of Registrars is that almost all of the white persons possessing the qualification to vote in said County are already registered, whereas thousands of Negroes, who possess the qualifications, are not registered and cannot vote." It was this fact, incidentally, which gave rise to the necessity of the dismissal of a cause of action against the Board of Registrars of Macon County for discriminatory practices in registration. *United States* v. *Alabama*,

5 Cir., 1959, — F. 2d — [No. 17684, June 16, 1959]. In Macon County, of which Tuskegee is a geographical part, neither the Constitution nor Congress nor the Courts are thus far able to assure Negro voters of this basic right.

That this has occurred demonstrates, I think, that the Fifteenth Amendment contemplated a judicial enforcement of its guaranties against either crude or sophisticated action of states seeking to subvert this new right.

If the force of the ballot was to be the sole sanction for the effectual enforcement of the constitutional guaranty, it really created no right and imposed no prohibition. For all that a recalcitrant state need do is neglect the implementing of its own election machinery. If a Court may strike down a law which with brazen frankness expressly purposes a rank discrimination for race, it has—and must have—the same power to pierce the veil of sham and, in that process, judicially ascertain whether there is a proper, rather than an unconstitutional, purpose for the act in question.

The Court denies the existence of that power. The Constitution is left to a majority of the Alabama Legislature.

X.

As Mr. Justice Frankfurter has recently said elsewhere, "The problem represented by this case is as old as the Union and will persist as long as our society remains a constitutional federalism." *Irvin* v. *Dowd*, 1959, — U. S. —, — S. Ct. —, 3 L. Ed. 2d — [May 4, 1959]. State Legislatures are accorded, and rightfully so, great respect and a far ranging latitude in their legislative programs. Occasionally there comes the time, however, when legislation oversteps its bounds. Then "it must • • • yield to an authority that is paramount to the state." *Wisconsin* v. *Illinois*, 1930, 281 U. S. 179, 197, 50 S. Ct. 266, 74 L. Ed. 799 (per Holmes, J.).

In such times the Courts are the only haven for those citizens in the minority. I believe this is such a time.

I respectfully dissent.

WISDOM, Circuit Judge, concurring:

I concur fully in the majority opinion. However, the gravity of the issue, the gulf between the majority and dissenting opinions, and a few sharp quillets in the dissent impel me to make some observations on the application to the instant case of the doctrine of judicial abstention in political cases.

I.

The plaintiffs propose a cure worse than the disease. The Court therefore should withhold the exercise of its equity powers. That was Mr. Justice Rutledge's view in an analogous situation. *Colegrove* v. *Green*, 1946, 328 U. S. 549, 566. That is my view in this case.

An attempt by the federal judiciary to control a state legislature's right to fix the boundaries of a political subdivision is an intrusion of national courts in the polity of a state that in a federal system carries consequences even more serious and far-reaching than the partial disfranchisement of plaintiffs unable to vote in municipal elections because by legislative definition their voting district is not in a municipality. There are other considerations. The plantiffs ask for something courts cannot give. Courts, any courts, are incompetent to remap city limits. And any decree in this case purporting to give relief would be a sham: the relief sought will give no relief.

There is an obvious reply: in a democratic country nothing is worse than disfranchisement. And there is no such thing as being just a little bit disfranchised. A free man's right to vote is a full right to vote or it is no right to vote. Perhaps so, but in similar situations—to me they are similar—the United States Supreme Court has made no such reply. Instead, in at least two decisions the Supreme Court declined jurisdiction when the relief from partial disfranchisement would require federal courts to intrude in the internal structure and organization of the

government of a state. *Colegrove* v. *Green*, 1946, 328 U. S. 549; *South* v. *Peters*, 1950, 339 U. S. 276.

When Illinois partially disfranchised the citizens in its seventh congressional district by gerrymandering[1] away ninety per cent of their effective vote as against the vote of Illinois citizens in the fifth congressional district, the Court declined to interfere. *Colegrove* v. *Green*, 328 U. S. 549. In congressional elections, therefore, 100,000 votes may equal 900,000 votes, and a thirty-five per cent minority may outvote a sixty-five per cent majority (over the state as a whole). Georgia, by the county-unit device, disfranchises citizens of Fulton County (Atlanta) by ninety-nine per cent as against citizens in certain rural counties.[2] When the constitutionality of the system was attacked in the Supreme Court, again the Court held that federal courts should not interfere. *South* v. *Peters*, 339 U. S. 276.

I can see no difference between partially disfranchising negroes and partially disfranchising Republicans, Democrats, Italians, Poles, Mexican-Americans, Catholics, blue-stocking voters, industrial workers, urban citizens, or other groups who are euchered out of their full suffrage because their bloc voting is predictable and their propensity for propinquity or their residence in certain areas, as a result of social and economic pressures, suggests the technique of partial disfranchisement by gerrymander or malapportionment. I can see no difference between depriving negroes of the right to vote in municipal elections in Tuskegee and not counting at their full value votes cast in certain districts in Illinois in a congressional election or votes cast in certain counties in Georgia in a state election. The dissenting

[1] The Supreme Court of Illinois invalidated a 1931 reapportionment and ordered a return to the statute of 1901. Moran v. Bowley, 1932, Ill. S. Ct. 179 N. E. 526. Legislative inaction resulted in a gerrymander as effective as any gerrymander created by legislative action reshuffling district lines.

[2] For a defense of the system see Henson, The County Unit System is Constitutional, 14 Ga. Bar J. 22 (1951).

justices in *Colegrove* v. *Green* and in *South* v. *Peters* found no sound distinction between those cases and the negro-voting cases.

Colegrove v. *Green* and *South* v. *Peters* may be distinguishable at the periphery. At the center these cases and the instant case are the same. In the respect that *Colegrove* v. *Green* involved congressional districts, there was more reason for federal courts to intervene in Illinois' gerrymandering affecting federal elections than there would be to intervene in Albama's gerrymandering that affects only municipal elections.

No one thinks that in *Colegrove* v. *Green* and *South* v. *Peters* the Supreme Court gave its constitutional blessing to partial disfranchisement. The Court did not reach the constitutional question. The Supreme Court was willing to assume that malapportionment was unconstitutional. "The Constitution", said Mr. Justice Frankfurter for the majority in *Colegrove* v. *Green*, "has many commands that are not enforceable by the courts, because they clearly fall outside the conditions and purposes that circumscribe judicial action."[3] In effect, the suit was "an appeal to the federal courts to reconstruct the electoral process of Illinois". Mr. Justice Frankfurter stated: "[T]he petitioners ask of this Court what is beyond its competence to grant. . . . [T]his Court, from time to time, has refused

[3] Mr. Justice Frankfurter continued: "Thus, 'on Demand of the executive Authority,' Art. IV, § 2, of a State it is the duty of a sister State to deliver up a fugitive from justice. But the fulfillment of this duty cannot be judicially enforced. Commonwealth of Kentucky v. Dennison, 24 How. 66. The duty to see to it that the laws are faithfully executed cannot be brought under legal compulsion. State of Mississippi v. Johnson, 4 Wall. 475. Violation of the great guaranty of a republican form of government in States cannot be challenged in the courts. Pacific States Telephone & Telegraph Co. v. Oregon, 223 U. S. 118. The Constitution has left the performance of many duties in our governmental scheme to depend on the fidelity of the executive and legislative action and, ultimately, on the vigilance of the people in exercising their political rights." Colegrove v. Green, 328 U. S. 549, 556.

to intervene in controversies * * * because due regard for the effective working of our government revealed the issue to be of a peculiarly political nature and therefore not meet for judicial interference." Mr. Justice Rutledge, concurring, stated:

> "[The Court has] power to afford relief in a case of this type. * * * But the relief it seeks pitches this Court into delicate relation to the functions of state officials and Congress, compelling them to take action which heretofore they have declined to take voluntarily or to accept the alternative of electing representatives from Illinois at large in the forthcoming elections: * * * If the constitutional provisions on which appellants rely give them the substantive rights they urge, other provisions qualify those rights in important ways by vesting large measures of control in the political subdivisions of the government and the state. * * * I think, therefore, the case is one in which the Court may properly and should decline to exercise its jurisdiction."

In *South v. Peters*, 1950, 339 U. S. 276, a majority of the Supreme Court considered that the holding warranted only a short per curiam opinion: "Federal courts consistently refuse to exercise their equity powers in cases posing political issues arising from a state's geographical distribution of electoral strength among its political subdivisions."

Long before these cases the Cherokee Nation asked for an injunction to restrain the State of Georgia and its officials from asserting certain rights and powers over the people of the Cherokee Nation. In defiance of a treaty between the United States and the Cherokee Nation, Georgia had passed laws dividing the Indian territory into districts and subjecting the Cherokees to the jurisdiction of the state. The Cherokees had the sympathy of almost all Americans. They had no possible haven but the United States Supreme Court. The Court refused to take jurisdiction. *The Chero-*

kee Nation v. *The State of Georgia*, 1831, 30 U. S. (5 Pet.) 1, 8 L. Ed. 1. In the opinion the Court, Chief Justice John Marshall went out of his way to write, by way of dictum:

> "If courts were permitted to indulge their sympathies, a case better calculated to excite them can scarcely be imagined. • • • A serious additional objection exists to the jurisdiction of the court. Is the matter of the bill the proper subject for judicial inquiry and decision? • • • The bill requires us to control the Legislature of Georgia, and to restrain the exertion of its physical force. The propriety of such an interposition by the court may be well questioned. It savors too much of the exercise of political power to be within the proper province of the judicial department."

II.

With due deference to my able associate, it seems to me that the rhetorical questions in the opening paragraphs of the dissent assume a process of reaching a decision that is inapplicable to political cases. In political cases there are few absolutes and few either-or questions. There may be some matters that clearly fall within the exclusive control of the executive or the legislative branches of government or controversies that these political departments manifestly may settle more appropriately than the judicial department. Courts then apply the doctrine of abstention almost automatically. But since every official act is political in a sense, in most cases courts are driven to inquire. How political? And what are the consequences of granting or denying the relief requested? Because of this and because discretionary equitable powers usually are involved, courts have considered it proper to take a pragmatic approach and to weigh a variety of considerations in reaching a decision, not stopping, for example, with the flat statement that the

issue is political and non-justiciable.[4] A weighing of practical considerations along with broad principles may blur the line between no-jurisdiction and jurisdiction-but-abstention, yet it has characterized political cases since *Luther* v. *Borden*, 1849, 7 How. (U. S.) 1.

To abstain or not to abstain in a hard case that seriously affects the balance between the federal government and the states puts a court to the task of assaying values and assessing effects. Here we must weigh the value, in a federal system, of preserving the integrity of a state as a polity, including a state's control over its political subdivisions and the state administrative process—against the value of an individual's right to vote in city elections when as a consequence of a state law gerrymandering municipal limits he does not live in a municipality. We must weigh the effects of federal action against inaction, of judicial intervention against self-limitation. This weighing of values and effects is in no sense a play on the word "political". It is a reasonable basis for a decision that may appear indefensible only when the case is sought to be reduced to the single question: did the plaintiff have a constitutional right of which he was deprived or did he not?

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[4] In Colegrove v. Green, for example, the Court attached importance to these considerations: the court lacked satisfactory criteria for a judicial determination; the basis for the suit was not a private wrong, but a wrong suffered by Illinois as polity; no court can affirmatively remap the Illinois districts; it is hostile to a democratic system to involve the judiciary in the politics of the people; regard for the Constitution as a viable system precludes judicial correction, since authority for dealing with the problem resides first with Congress and ultimately with the people (to secure a state legislature that will apportion properly); malapportionment is chronic and embroiled in politics, and courts should avoid this political thicket; the Constitution has many commands that are not enforceable but left to legislative or executive action, and ultimately to the people; the possible consequences of decision were of great magnitude and the judicial processes inadequate for dealing with them; in our system of government it is appropriate that Congress have the final determination whether to seat Congressmen.

III.

In my judgment, *Colegrove* v. *Green* and *South* v. *Peters* control this case. Even if they were not controlling, I would favor withholding the exercise of our equity powers for the reasons given and for the following reasons.

(1) Grant of relief would put federal courts in the position of interfering with the internal governmental structure of a state, putting a new kind of strain on federal-state relations already severely strained. Control over the political subdivisions of a state including the incorporation of cities and towns and the determination of their boundaries, is a political function of the state legislature and an attribute of state sovereignty in a federal union. So it has always been held. Let the chips fall where they may, the courts have decided. This is the substance of the holdings in *Laramie County* v. *Albany County*, 1876, 92 U. S. 307; *Town of Mount Pleasant* v. *Beckwith*, 1879, 100 U. S. 514; and *Hunter* v. *Pittsburgh*, 1907, 207 U. S. 161. In these and similar cases the citizens who suffered from changes in city limits, by loss of property values or by increased taxation (if the boundaries are extended) or from lack of fire and police protection (if the boundaries are contracted) and from loss of voting privileges (in the case of a gerrymander), were in the same situation as the plaintiffs are in this case.

(2) The plaintiffs ask the Court to hold unconstitutional a law that is clearly constitutional on its face. The statutory approach necessary to reach that somewhat unusual result would compel the Court to go beneath the surface of the law and impute to the legislature an unprofessed subjective intention. This ulterior motive, when coupled with inferences from the effect of the law, would then be fatal to the constitutionality of the statute. As Mr. Justice Cardozo put it, this process spreads psychoanalysis to unaccustomed fields. *United States* v. *Constantine*, 296 U. S.

287, 299. I recognize that occasionally there may be statutes which are unconstitutional in the light of their effect and the legislature's intentions. Over the long pull, however, I believe that the interests of justice lie in the direction of testing a law in the light of what the law says, not in the light of what the legislature intends. Rather than deviate from that principle in a case involving the exercise of a political function historically lodged with the state and free from federal supervision, I would heed the frequent admonition to avoid a decision upon the constitutional question when there is a tenable alternative ground for disposing of the controversy.

(3) This case differs from all cases involving successful complaints of discrimination under the Fourteenth and Fifteenth Amendments in that there is no effective remedy. An injunction will enable a citizen to vote—if he lives in a voting district where an election is held It is an empty right when he does not live in a voting district. The best that this Court could do for the plaintiffs would be to declare Act 140 of 1957 invalid. There is nothing to prevent the legislature of Alabama from adopting a new law redefining Tuskegee town limits, perhaps with small changes, or perhaps a series of laws, each of which might also be held unconstitutional, each decision of the court and each act of the legislature progressively increasing the strain on federal-state relations. As stated in Colegrove: "No court can affirmatively remap the Illinois districts. * * * At best we could only declare the existing electoral system invalid." Nor can this Court remap Tuskegee. If we had the competency to determine the proper geographical limits for towns in Alabama, still there would be no way of our giving effect to the talents of our judges: the plaintiffs' only real remedy is one we have no right to give—a mandamus against the legislature of Alabama.

In short, the situation is unmanageable. If we intervene we shall only intensify the very dispute we are asked to settle. And federal courts have no mission— from the

constitution or from that brooding omnipresence of higher law so often an influence on constitutional decisions—to find a judicial solution for every political problem presented in a complaint that makes a strong appeal to the sympathies of the court. To repeat the words of Chief Justice John Marshall: "If courts were permitted to indulge their sympathies, a case better calculated to excite them can scarcely be imagined. * * * [But] such an interposition by the court * * * savors too much of the exercise of political power to be within the proper province of the judicial department."

A true copy.

Test: EDWARD W. WADSWORTH
Clerk, U. S. Court of Appeals,
Fifth Circuit

By MICHAEL D. FEEHAN
Deputy

(SEAL)

New Orleans, Louisiana
Sep. 18, 1959

Judgment

(Extract from the Minutes of September 15, 1959)

This cause came on to be heard on the transcript of the record from the United States District Court for the Middle District of Alabama, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered and adjudged that the appellants, C. G. Gomillion, and others, be condemned, in solido, to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

"Brown, Circuit Judge, Dissenting."

"Wisdom, Circuit Judge, Specially Concurring."

NO. ~~668~~ 32

IN THE

Supreme Court of The United States

October Term, 1959

C. G. GOMILLION, et al.,

Petitioners,

V.

PHIL M. LIGHTFOOT, As Mayor of The City of Tuskegee, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

THOMAS B. HILL, JR.,
Second Floor, Hill Building,
P. O. Box 116,
Montgomery, Alabama,

JAMES J. CARTER,
Second Floor, Hill Building,
P. O. Box 116,
Montgomery, Alabama,

HARRY D. RAYMON,
Tuskegee, Alabama,
Counsel For Respondents.

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OPINIONS BELOW

The opinion of the District Court (R. 29) is reported at 167 F. Supp. 405. The opinion of the Court of Appeals (Petition, Appendix p. 17) is reported at 270 F. 2d 594.

JURISDICTION

The jurisdictional requisites are set forth in the Petition.

QUESTIONS PRESENTED

1. May a State, by and through its duly constituted Legislature, fix and determine the territorial boundaries of a municipal corporation of that State?

2. May, or should, a Federal Court review the fixing and determination of the territorial boundaries of a municipality by a State Legislature, and annul and set aside the boundaries determined by the State Legislature and fix or substitute different or other boundary lines?

3. In the consideration of a State statute will the Federal Courts make inquiry into the motive or motives of a legislator or of legislators?

4. Should the Federal Courts abstain from exercising jurisdiction or equity powers in cases posing political issues arising from a State's determination of the geographical boundaries of a City, one of its political subdivisions?

STATUTE INVOLVED

Act No. 140, Acts of Alabama, Regular Session, 1957, "To alter, re-arrange, and re-define the boundaries of the City of Tuskegee in Macon County." The Act, with minor typographical errors, is set out in full in the Petition at pp. 2-3.

STATEMENT

The Petitioners' complaint asks for a declaratory judgment that Act 140 of the 1957 Regular Session of the Legislature of Alabama, altering, redefining and rearranging the boundaries of the City of Tuskegee, Alabama, is invalid and in violation of the due process and equal protection clauses of the Fourteenth and Fifteenth Amendments to the Constitution of the United States. The complaint also asks injunctive relief to restrain the Mayor and Officers of Tuskegee, and the Probate Judge and other officials of Macon County,

Alabama, from enforcing said Act, and requiring that Petitioners and others, who are negroes, and who prior to the enactment of Act 140 did, but since the said Act do not now, reside within the corporate limits of the City, "be recognized and treated in all respects as citizens of the City of Tuskegee" (R. 12).

In the District Court respondents moved to strike the complaint and certain exhibits thereto consisting of: a copy of a newspaper story, a copy of an article in *Time* magazine, and unrelated legislation and statements (R. 17-19). Respondents also moved the Court to dismiss the action for failure to state a claim, for lack of jurisdiction, and upon other grounds (R. 26-28).

The District Court held the fixing of municipal boundaries and limits to be a matter for the Legislature and not the Courts, and dismissed the action (R. 29-40). On appeal, the Court of Appeals affirmed. The majority opinion of the Court of Appeals essentially followed the reasoning of the district judge (Petitioners' Appendix p. 17); one judge dissented (Petitioners' Appendix p. 26); and one judge specially concurred, stating that in addition to the holding of the majority opinion he would apply "the doctrine of judicial abstention in political cases" (Petitioners' Appendix p. 52).

ARGUMENT

REASONS FOR DISALLOWANCE OF WRIT

I

THE POWER OF A STATE TO DETERMINE TERRITORIAL BOUNDARIES OF ONE OF ITS MUNICIPAL CORPORATIONS.

We respectfully submit that the judgment of dismissal, affirmed by the Court of Appeals, was entirely proper, and is supported by an unbroken line of decisions by this Honorable Court and other courts. There is no conflict of decisions, and no departure from settled law.

That a state legislature has the power to detach territory from municipalities or to extend, rearrange, or limit the boundaries thereof is universally recognized. This Court long ago, and continuously since, has recognized and announced the rule that counties, cities, and towns are municipal corporations, created by the authority of the Legislature, deriving "all their powers from the source of their creation, except where the Constitution of the State otherwise provides. . . ." And the State Legislature has authority to amend the Charter, enlarge or diminish its powers, "extend or limit its boundaries, divide the same into two or more, consolidate two or more into one . . . and even abolish the municipality altogether in the legislative discretion. Cooley on Const., 2d Ed. 192." *Laramie County v. Albany County*, 92 U. S. 307; *Mount Pleasant v. Beckwith*, 100 U. S. 514; Cooley's Constitutional Limitations, 8th Ed., Vol. I, Chapt. VIII, 393, et seq.

In *Kelly v. Pittsburgh*, 104 U. S. 78, a case of annex-

ation of territory, involving argument under the Fourteenth Amendment, this Court said:

> "What portion of a State shall be within the limits of a City and governed by its authorities and its laws has always been considered to be a proper subject of legislation."

Then in *Hunter v. Pittsburgh*, 207 U. S. 161, the Court again had occasion to consider the power of a State acting through its duly elected and constituted Legislature, and within the limits of the State Constitution, to "expand or contract the territorial area" of a municipality, without hindrance or interference by Federal Courts. In clear, forceful, emphatic language the Court "quickly disposed" of the issues by "the application of well-settled principles.

> "We have nothing to do with the policy, wisdom, justice, or fairness of the act under consideration; those questions are for the consideration of those to whom the State has entrusted its legislative power, and their determination of them is not subject to review or criticism by this court. We have nothing to do with the interpretation of the Constitution of the State and the conformity of the enactment of the Assembly to that Constitution; those questions are for the consideration of the courts of the State, and their decision of them is final."

Then, after referring to numerous prior decisions, the Court continued, saying that the following principles have been established, "and have become settled doctrines of this Court, to be acted upon wherever they are applicable.

"Municipal corporations are political subdivisions of the State, created as convenient agencies for exercising such of the governmental powers of the State as may be entrusted to them. For the purpose of executing these powers properly and efficiently they usually are given the power to acquire, hold, and manage personal and real property. The number, nature, and duration of the powers conferred upon these corporations and the territory over which they shall be exercised rests in the absolute discretion of the State. Neither their charters, nor any law conferring governmental powers, or vesting in them property to be used for governmental purposes, or authorizing them to hold or manage such property, or exempting them from taxation upon it, constitutes a contract with the State within the meaning of the Federal Constitution. The State, therefore, at its pleasure, may modify or withdraw all such powers, may take without compensation such property, hold it itself, or vest it in other agencies, expand or contract the territorial area, unite the whole or a part of it with another municipality, repeal the charter and destroy the corporation. All this may be done, conditionally or unconditionally, with or without the consent of the citizens, or even against their protest. In all these respects the State is supreme, and its legislative body, conforming its action to the state Constitution, may do as it will, unrestrained by any provision of the Constitution of the United States. Although the inhabitants and property owners may, by such changes, suffer inconvenience, and their property may be lessened in value by the bur-

> den of increased taxation, or for any other reason, they have no right, by contract or otherwise, in the unaltered or continued existence of the corporation or its powers, and there is nothing in the Federal Constitution which protects them from these injurious consequences. The power is in the State, and those who legislate for the State are alone responsible for any unjust or oppressive exercise of it."

Some of the later United States Supreme Court cases citing *Hunter v. Pittsburgh* with approval are: *Pawhuska v. Pawhuska Oil Co.*, 250 U. S. 394; *Trenton v. New Jersey*, 262 U. S. 182; and *Faitoute Co. v. Asbury Park*, 316 U. S. 502.

State Courts have also consistently followed the rule so clearly and decisively announced in *Hunter v. Pittsburgh*. In *City of Birmingham v. Norton*, 255 Ala. 262, 50 So. 2d 754, the Supreme Court of Alabama committed Alabama to the rule announced in *Hunter v. Pittsburgh*, quoting in extenso that portion of the opinion set out above. Louisiana has done likewise in *State v. City of Baton Rouge*, 40 So. 2d 477 (483). Also see *Madison Metropolitan Sewer District v. Committee*, 260 Wis. 229, 50 N. W. 2d 424; *State vs. Wellston Sewer District*, (Mo. 1933) 58 S. W. 2d 988, 922, 993:

> "Relators also contend that they have certain inalienable rights more intangible in nature, such as the right to life, liberty, health and the privileges of citizenship, which have been denied them by repeal of the sewer law in violation of the several sections of the state and federal Constitutions cited in this opinion. . . .

"Speaking to the same question, as bearing on the alteration or dissolution of a municipal corporation, the Supreme Court of the United States said in Hunter v. City of Pittsburgh, 207 U. S. 161, 178, 179, 28 S. Ct. 40, 46, 52 L. Ed. 151, 159: 'Municipal corporations are political subdivisions of the state, created as convenient agencies for exercising such of the governmental powers of the state as may be entrusted to them. . . . The state, therefore, at its pleasure . . . may expand or contract the territorial area. . . .'"

In Kentucky it has been held that, "The extension or reduction of the boundaries of a city or town is held, without exception, to be purely a political matter, entirely within the power of the Legislature of the state to regulate." *Lenox Land Co. v. City of Oakdale*, 125 S. W. 1089, opinion extended, 127 S. W. 538. And, "From whatever point it is viewed, the subject returns to this: The act of incorporating towns, and enlarging or restricting their boundaries, is legislative and political. In its exercise of discretion in such matters the Legislature has plenary power." *Carrithers v. City of Shelbyville*, 104 S. W. 744. See also *State v. Crimson*, 188 S. W. 2d 937.

McQuillin, Municipal Corporations (3rd Ed.), Sec. 4.05, Vol. 2 at page 18 says:

"... the legislature, who may enlarge or diminish its territorial extent or its functions, may change or modify its internal arrangement, or destroy its very existence, with the mere breath of arbitrary discretion. Sic volo, sic jubeo, that is all the sovereign need say. . . ."

Black River Regulat. Dist. v. Adirondock League Club, 121 N. E. 2d 428, 433, (N. Y. Ct. of Appeals, 1954): "The concept of the supreme power of the Legislature over its creatures has been respected and followed in many decisions."

Williams vs. Book, (S. D. 1953) 61 N. W. 2d 290, 294:

> "The power of the legislature in the Control of Counties and other political subdivisions is unrestrained by requirements of due process."

City of New York vs. Village of Lawrence, 165 N. E. 836: "The power to enlarge or restrict the boundaries of an established city is an incident of the legislative power to create and abolish municipal corporations and to define their boundaries."

The foregoing are only a few of the many cases which might be cited as supporting, following and reaffirming the rule enumerated in *Hunter v. Pittsburgh*. To cite or discuss them all would unnecessarily prolong this brief.

Furthermore, the attempt to link the state statute in question to complaints as to registration for voting lodged with or investigated by the Civil Rights Commission, fails to take note of the fact that Act 140 neither cancelled the registration of any voter, nor put any obstacle in the path of any qualified person desiring to register to vote. The right to register or to vote is not affected. Any voter who was formerly a resident within the boundaries of the City of Tuskegee can still vote, except that by reason of his present non-residence he may not vote in city elections, and his rights to vote or his obligation to pay taxes are no greater or

no less than the right of any other citizen, white or negro, who lives in the County outside the boundaries of a municipality. As Judge Jones observed in the majority opinion below, when a person removes from a municipal corporation he loses his membership and the rights (obligations, duties, taxes, and other burdens) incident to such membership, "and this is no less true where the removal is involuntary and results from a change of boundaries than where the resident removes to another place. That this is so does not restrict the legislative power to alter municipal boundaries."

No one has a vested right to be either included in or excluded from a local governmental unit.[1] The confusion that would inevitably result from the vesting in, or assumption by, the Courts of the power and authority "to expand or contract the territorial area" of municipal corporations or other political subdivision, is obvious and tremendous. If the Courts have the power to supervise or control the legislative authority to expand or contract the territorial area of a political subdivision, a city or county, they have by the same token the power to create or destroy such a political subdivision. If the lower court has the power to say to the Legislature of Alabama, "You cannot reduce the corporate limits of Tuskegee", then by the same authority, the Court would have had the right and authority to say to the Legislature, upon petition of these

1. *Hunter v. Pittsburgh*, although studiously ignored by appellants has been cited and followed as late as April 17, 1957, in *Port of Tacoma v. Parosa*, 324 P. 2d 438, 441; and October, 1958, in *People v. City of Palm Springs*, 331 P. 2d 4, where the court observed that no one "has a vested right to be either included or excluded from a local governmental unit." See also *Halstead v. Rozmiarek* (Neb. 1959), 94 N. W. 2d 37.

same plaintiffs, if the corporate limits prior to the act complained of had not included or embraced them, "You must expand the corporate limits of Tuskegee to please these plaintiffs." Can anyone seriously contend that the Court is possessed of such authority? Could anyone seriously contend that the lower Court, or any other Court, could say to the Legislature of Alabama that either Act 232 of 1865-1866, which originally incorporated Tuskegee and fixed its boundaries 2½ miles square; or Act 40 of 1868, which reduced the town limits to one mile square; or Act 210 of 1869-1870, which expanded the boundaries; or Act 299 of 1872, which defined the boundaries; or Act 106 of 1898-1899, fixed for all times the boundaries of Tuskegee?

For the Court below to have granted the relief prayed for by plaintiffs in the case at bar, it would have had to ignore precedents which have been established and repeatedly followed, affirmed, and re-affirmed.

II

LEGISLATIVE MOTIVE

Appellants have attempted to make much of the alleged motive, which they label as intention or purpose, which prompted the passage of the Act in question, going so far as to set out some of the personal and political background of the legislator who introduced the Act (R. 8), and adding as further background other legislation (R. 9), and a newspaper article and the comment of a magazine of national circulation. (R. 9; Exhibit 3, R. 17; Exhibit 4, R. 19; Exhibit 5, R. 22). In the petition they go even further afield and beyond the record by making references to newspaper articles in the New York Times, with reference to a State Leg-

islator, who is no longer a member of the Alabama Legislature, (Petition p. 4); and to the Report of the United States Commission on Civil Rights. (Petition p. 14-15).[2] These references add nothing to the complaint.

It has long been the settled law of the land that the Courts "have nothing to do with the policy, wisdom, justice or fairness of the Act." *Hunter v. Pittsburgh*, supra. "If the State has the power to do an act, its intention or the reason by which it is influenced in doing it cannot be inquired into." *Doyle v. Continental Ins. Co.*, 94 U. S. 535, 541. "We cannot undertake a search for motive in testing constitutionality." *Daniel v. Family Security L. Ins. Co.*, 336 U. S. 220, 224. Also see, *Calder v. People of Michigan*, 218 U. S. 591; *Tenny vs. Brandhove*, 341 U. S. 367; *Arizona v. California*, 283 U. S. 423, 455.

The question concerning legislative motive and intention was considered and laid to rest by Judge Rives in the recent case of *Shuttlesworth v. Birmingham Board of Education*, 162 F. Supp. 372, 381; affirmed 358 U. S. 101:

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2. The quotation on page 15 of the Petition said to be the Civil Rights Commission's observation as to the statute involved in this litigation that "the City of Tuskegee recently moved to decrease" etc., illustrates a complete lack of knowledge as to how Act 140 was enacted. In Alabama, as in most states, we have laws under which municipalities may, by following prescribed procedure, initiate the extending or reduction of corporate limits. Code of Ala. 1940, Title 37, Art. 1, Sec. 134 et seq., Art. 6, Sec. 237, et seq. But here we are dealing with the direct action of the Legislature of Alabama, not with some action by the City of Tuskegee; and the Legislature of Alabama has the power to establish, alter, extend, or contract municipal boundaries. Ala. Constitution of 1901, Sec. 104 (18); *Ensley v. Simpson*, 166 Ala. 366, 52 So. 61; *State v. Gullatt*, 210 Ala. 452, 98 So. 373.

"In testing constitutionality 'we cannot undertake a search for motive'. 'If the state has the power to do an act, its intention or the reason by which it is influenced in doing it cannot be inquired into.' *Doyle v. Continental Insurance Co.*, 94 U. S. 535, 541, 24 L. Ed. 148. As there is no one corporate mind of the legislature, there is in reality no single motive. Motives vary from one individual member of the legislature to another. Each member is required to 'be bound by Oath or Affirmation to support this Constitution.' Constitution of the United States, Article VI, Clause 3. Courts must presume that legislators respect and abide by their oaths of office and that their motives are in support of the Constitution."

III

JUDICIAL ABSTENTION IN POLITICAL CASES

This case is a direct attack upon action of a State in the exercise of a power concerning one of its political subdivisions. The concurring opinion of Judge Wisdom (Petition p. 52) suggests that the Court should "not put a new kind of strain on federal-state relations", and should withhold the exercise of its equity powers in a case such as this. He points out that courts "are incompetent to remap city limits", and discusses and analyzes cases such as *Colegrove v. Green*, 328 U. S. 549; *South v. Peters*, 339 U. S. 276; and *The Cherokee Nation v. The State of Georgia*, 30 U. S. (5 Pet.) 1. Judge Wisdom has clearly covered the matter, and his opinion forcefully illustrates other compelling reasons why the writ should not be granted.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

THOMAS B. HILL, JR.
Second Floor, Hill Building
P. O. Box 116
Montgomery, Alabama

JAMES J. CARTER
Second Floor, Hill Buildjng
P. O. Box 116
Montgomery, Alabama

HARRY D. RAYMON
Tuskegee, Alabama

Counsel for Respondents.

No. 668 32

In the Supreme Court of the United States

OCTOBER TERM, 1959

C. G. GOMILLION, ET AL., PETITIONERS

v.

PHIL. M. LIGHTFOOT, AS MAYOR OF THE CITY OF TUSKEGEE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

J. LEE RANKIN,
Solicitor General,
Department of Justice, Washington 25, D.C.

In the Supreme Court of the United States

OCTOBER TERM, 1959

No. 668

C. G. GOMILLION, ET AL., PETITIONERS

v.

PHIL M. LIGHTFOOT, AS MAYOR OF THE CITY OF TUSKEGEE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

The United States joins with petitioners in urging this Court to grant a writ of certiorari to the Court of Appeals for the Fifth Circuit.

This case presents issues of national significance. For many years, the Federal Government, through all its branches, has sought to make meaningful the guarantees of the Constitution and to assure that all of its people enjoy full rights of citizenship without discrimination because of race or color. Actions such as the exclusion of Negroes from Tuskegee not only represent a negation of our national purposes but they also impede the effective participation by those affected in the attainment of their rights.

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If the allegations of the complaint are sustained, the legislation in question has eliminated from a city in Alabama virtually all of its Negro citizens. They have been deprived of the right to vote in municipal elections in Tuskegee, and of all other rights to benefits which they enjoyed as members of that community. In effect, they have been relegated to a ghetto by an act of the State. No reason for the bizarre redrawing of the boundaries of the City of Tuskegee has been advanced other than that the legal and political rights of citizenship in the municipality should be denied to Negroes because they are Negroes. Such a design, and such a result, are patently unconstitutional. Cf. *Buchanan* v. *Warley*, 245 U.S. 60. "States may do a good deal of classifying that it is difficult to believe rational, but there are limits, and it is too clear for extended argument that color cannot be made the basis of a statutory classification affecting the right set up in this case [*i.e.*, the right to vote]." Holmes, J., in *Nixon* v. *Herndon*, 273 U.S. 536, 541.

The decisions of the lower courts denying relief to petitioners rest on the grounds: (1) the states have plenary and unfettered discretion in regulating the boundaries of their municipalities, and (2) if constitutional limitations on the exercise of that discretion exist, they cannot or should not be enforced by the federal judiciary.

The first ground of decision is contrary to settled law. Even in areas of otherwise exclusive state concern, the states may not use race or color as a basis of legislation affecting rights protected by the Constitution.

As this Court said in *Cooper* v. *Aaron*, 358 U.S. 1, 19, with respect to another area traditionally under state control:

> It is, of course, quite true that the responsibility for public education is primarily the concern of the States, but it is equally true that such responsibilities, like all other state activity, must be exercised consistently with federal constitutional requirements as they apply to state action. * * *

The action of the legislature of Alabama, to the extent that it affected voting rights, contravened the Fifteenth Amendment. Beyond that, because Negroes were specifically singled out for dissimilar treatment, it also violated the Fourteenth Amendment. We are not here dealing with a non-racial dilution of the right to vote but with a total deprivation not merely of that right but of all rights to benefits of citizenship in a municipality, solely on account of race. Nor does this case present any of the relief problems sometimes envisaged by the courts in the legislative apportionment cases. A judgment in this case would require simply a return to the *status quo* existing prior to the discriminatory action of the State, relief traditionally within judicial authority.

This case recalls the admonition of *Strauder* v. *West Virginia*, 100 U.S. 303, 307–308:

> The words of the [Fourteenth] Amendment, it is true, are prohibitory, but they contain a necessary implication of a positive immunity, or right, most valuable to the colored race,—the right to exemption from unfriendly legislation against them distinctively as colored,—exemp-

tion from legal discriminations, implying inferiority in civil society, lessening the security of their enjoyment of the rights which others enjoy, and discriminations which are steps towards reducing them to the condition of a subject race.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

J. LEE RANKIN,
Solicitor General.

MARCH 1960.

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Supreme Court of the United States

October Term, 1960

No. 32

C. G. GOMILLION, et al.,

Petitioners,

v.

PHIL M. LIGHTFOOT, As Mayor of the City of Tuskegee, et al.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR PETITIONERS

ROBERT L. CARTER
20 West 40th Street
New York, New York

FRED D. GRAY
34 North Perry Street
Montgomery, Alabama

ARTHUR D. SHORES
1527 Fifth Avenue, North
Birmingham, Alabama

Attorneys for Petitioners.

IRMA ROBBINS FEDER,
of Counsel.

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BRIEF FOR PETITIONERS

Opinion Below

The opinion of the Court of Appeals (R. 34-73), entered by a divided court, is reported at 270 F2d 594.

Jurisdiction

The judgment of the Court of Appeals was rendered on September 15, 1959 (R. 73). On December 4, 1959, by order of Mr. Justice Black, the time within which to file a petition for writ of certiorari was extended to February 1, 1960 (R. 74). The petition was filed on January 30, 1960, and was granted on March 21, 1960. The jurisdiction of this Court rests on Title 28, United States Code, Section 1254 (1).

Question Presented

Whether the Fourteenth and Fifteenth Amendments, which bar deprivations of rights, privileges, immunities and the franchise by reason of race or color, have been contravened where a state, in exercise of its power to rechart the boundary lines of one of its geographical subdivisions, utilizes that power to deny to Negroes the rights and benefits of residence in a municipality, including the right to vote in municipal elections?

Statute Involved

Act No. 140

To alter, re-arrange, and redefine the boundaries of the City of Tuskegee in Macon County.

Be It Enacted by the Legislature of Alabama:

Section 1. The boundaries of the City of Tuskegee in Macon County are hereby altered, re-arranged and redefined so as to include within the corporate limits of said municipality all of the territory lying within the following described boundaries, and to exclude all territory lying outside such boundaries:

[fol. 14] Beginning at the Northwest Corner of Section 30, Township 17-N, Range 24-E in Macon County, Alabama; thence South 89 degrees 53 minutes East, 1160.3 feet; thence South 37 degrees 34 minutes East, 211.6 feet; thence South 53 degrees 57 minutes West, 545.4 feet; thence South 36 degrees 03 minutes East, 1190.0 feet; thence South 53 degrees 57 minutes West, 675.2 feet; thence South 36 degrees 19 minutes East, 743.4 feet; thence South 33 degrees 50 minutes East, 1597.4 feet; thence North 61 degrees 26 minutes East, 1122.8 feet; thence North 28 degrees 34 minutes West, 50.0 feet; thence North 59 degrees 11 minutes East 1049.3 feet; thence South 30 degrees 48 minutes East,

50.0 feet; thence North 50 degrees 08 minutes East, 341.1 feet; thence North 47 degrees 08 minutes East, 1239.4 feet; thence South 42 degrees 51 minutes East, 300.0 feet; thence South 47 degrees 00 minutes West, 1199.5 feet; thence South 64 degrees 09 minutes East, 1422.0 feet; thence South 24 degrees 13 minutes East 488.7 feet; thence South 73 degrees 25 minutes West, 370.8 feet; thence North 79 degrees 25 minutes West, 2285.3 feet; thence South 61 degrees 26 minutes West, 1232.6 feet; thence South 41 degrees 03 minutes East 792.3 feet; thence South 12 degrees 03 minutes East, 842.2 feet; thence North 88 degrees 09 minutes East, 4403.6 feet; thence South 0 degrees 15 minutes West, 6008.2 feet; thence North 89 degrees 59 minutes West, 4140.2 feet; thence North 34 degrees 46 minutes West, 6668.7 feet; thence North 35 degrees 00 minutes West, 380.4 feet; thence North 16 degrees 55 minutes West, 377.2 feet; thence North 54 degrees 29 minutes East, 497.8 feet; thence North 35 degrees 02 minutes West, 717.5 feet; thence South 54 degrees 03 minutes West, 1241.9 feet; thence North 36 degrees 09 minutes West, 858.4 feet; thence North 44 degrees 28 minutes East [fol. 15] 452.2 feet; thence North 22 degrees 33 minutes East, 4305.9 feet; thence North 86 degrees 43 minutes East, 236.3 feet to the point of beginning.

Section 2. All laws or parts of laws which conflict with this Act are repealed.

Section 3. This Act shall become effective immediately upon its passage and approval by the Governor, or upon its otherwise becoming a law.

This bill became an Act on July 15, 1957 without approval by the Governor.

Statement

Petitioners are citizens of the United States, residents of the State of Alabama, and they are Negroes. Prior to July 15, 1957, when Act 140 became law, petitioners lived in Tuskegee, Alabama, the site of famed Tuskegee Institute.

The town was square in shape and at that time had a total population of 6,707, of which 5,397 were Negroes and 1,310 were white. Its 1,000 qualified electors included 400 Negroes (R. 5).

Pursuant to Act 140 Tuskegee was sharply reduced in size. As redefined the city is no longer four-sided or square in shape but has twenty-eight sides, giving it the semblance of a sea dragon. The new boundaries place outside the city limits all the areas of concentrated Negro residence and Tuskegee Institute as well. Carefully kept within the diminished municipality are all the areas in which white persons reside. As a result, while only 4 or 5 of the heretofore 400 qualified Negro voters are now eligible to participate in municipal elections, no qualified white electors has been affected by the diminution of the city's incloser (R. 6).

The contested legislation is the prodigy of State Senator Sam Engelhardt of Macon County, whose political career has been chiefly distinguished by a consistent and fervent sponsorship of measures and regulations designed to maintain enforced racial discrimination as the uninterrupted policy of the State of Alabama (R. 6).

Litigation was commenced in the District Court invoking federal jurisdiction under Title 28, United States Code, Sections 1331, 1343 and 2201 and 2202. The complaint prayed for judgment declaring Act 140 unconstitutional for the reason that its purpose and effect were to accomplish an unlawful discrimination against Negroes, in violation of the due process and equal protection clauses of the Fourteenth Amendment, and to deny them the right to vote in contravention of the Fifteenth Amendment. In addition, an injunction was sought restraining enforcement of the statute and prohibiting respondents from denying petitioners and other Negroes similarly situated rights and privileges equal to those available to all other citizens in Tuskegee, including the right to vote in its municipal elections (R. 1-9).

The complaint alleged that Tuskegee was the county seat of Macon County; that 7/8's of the population of Macon County are Negroes; that between January 16, 1956, and June 3, 1957, no Board of Registrars had functioned in that county to permit the registration of qualified voters because all eligible white persons had already registered, whereas thousands of qualified Negroes had not been registered and cannot vote (R. 6)

The trial court granted respondents' motion to dismiss on the theory that the court had no authority to "change any boundaries of municipal corporations fixed by a duly convened and elected legislative body, acting for the people in the State of Alabama" (R. 30). On appeal, the Court of Appeals affirmed by a divided vote, holding that (R. 41):

> . . . in the absence of any racial or class discrimination appearing on the face of the statute, the courts will not hold an act, which decreases the area of a municipality by changing its boundaries, to be invalid as violative of the Fourteenth and Fifteenth Amendments to the United States Constitution, although it is alleged that the enactment was made for the purpose, not appearing in the Act, and with the effect of excluding or removing Negroes from the City and depriving them of the privileges and benefits of municipal membership, including the right to vote in City elections.

Summary of Argument

Deprivations of Fourteenth and Fifteenth Amendment rights pursuant to state action are here involved. Whatever other purposes these provisions may serve, there can be no doubt that their ultimate concern is the protection of Negroes against unequal treatment, discrimination and disenfranchisement under color of state law. See *The Slaughter House Cases*, 16 Wall. 36; *Strauder* v. *West Virginia*, 100 U. S. 303. Following those early cases, this Court has consistently struck down state imposed racial

discrimination in all of its varied forms and manifestations as being constitutionally impermissible. See *Yick Wo* v. *Hopkins*, 118 U. S. 356; *Guinn* v. *United States*, 238 U. S. 347; *Lane* v. *Wilson*, 307 U. S. 268; *Nixon* v. *Herndon*, 273 U. S. 356; *Nixon* v. *Condon*, 286 U. S. 73; *Smith* v. *Allwright*, 321 U. S. 647; *Terry* v. *Adams*, 345 U. S. 461; *Buchanan* v. *Warley*, 245 U. S. 60; *Oyama* v. *California*, 332 U. S. 633; *Shelley* v. *Kraemer*, 334 U. S. 1; *Smith* v. *Texas*, 311 U. S. 128; *Hernandez* v. *Texas*, 347 U. S. 475; *Takahashi* v. *Fish and Game Commission*, 334 U. S. 410; *Sweatt* v. *Painter*, 339 U. S. 629; *McLaurin* v. *Oklahoma State Regents*, 339 U. S. 637; *Brown* v. *Board of Education*, 347 U. S. 483; *Cooper* v. *Aaron*, 358 U. S. 1; *Mayor & City Council of Baltimore* v. *Dawson*, 350 U. S. 877; *Gayle* v. *Browder*, 352 U. S. 903; *State Athletic Commission* v. *Dorsey*, 359 U. S. 533. Cf. *Henderson* v. *United States*, 339 U. S. 816.

Unhappily, therefore, the issues raised in the instant case are not new. Indeed, they have become commonplace to this Court as it has attempted to implement the Constitution's proscriptions against racial differentiation. Substance not form has guided the Court to decision in this area. And the fact that the discrimination is a refined rather than a rank breach of constitutional guarantees cannot save the state's act from condemnation. See *Cooper* v. *Aaron*, *supra*; *Lane* v. *Wilson*, *supra*.

Here the State of Alabama deliberately seeks to deprive Tuskegee Negroes of the political influence, which would normally result from their numerical preponderance, by a gerrymander which casts all but a few Negroes outside the city limits, preserving in white hands undisputed control of the city's electoral machinery. As importantly, Act 140 deprives Negroes of the right of residence in Tuskegee and of benefits incident thereto. Few would question the invalidity of this statute if the denial of the right of residence in Tuskegee (see *Buchanan* v. *Warley*, *supra*) or of the right to vote in its elections (*Terry* v.

Adams, supra) were directly spelled out or specific in terms. Yet it has long since been settled constitutional doctrine that where in its effect and reach the legislation discriminates in fact, it offends constitutional prohibitions. See, *e.g.*, *Yick Wo* v. *Hopkins, supra.*

The fact that the discrimination here complained of results from exercise of state power to redefine the boundaries of a geographic subdivision does not affect this conclusion. As long as the act in question is that of the state, it is subject to the limitations which the Fourteenth and Fifteenth Amendments impose. See *Home Tel. & Tel. Co.* v. *Los Angeles*, 227 U. S. 278; *Screws* v. *United States*, 325 U. S. 91; *Terry* v. *Adams, supra.*

The rationale of *Colegrove* v. *Green*, 328 U. S. 549; *MacDougall* v. *Green*, 335 U. S. 281; and *South* v. *Peters*, 339 U. S. 276, do not apply to this case. State enforced racial discrimination, and not state polity, is the basic issue in this litigation—and adjudication of that question has long been regarded as the special province of the federal judiciary.

While holding Act 140 invalid may not resolve the problem here presented for all time, since the state may seek to accomplish the same ends by other means, that prospect has never been a basis for withholding relief where a violation of Fourteenth or Fifteenth Amendment rights has been shown. See, *e.g.*, *Guinn* v. *United States, supra;* and *Lane* v. *Wilson, supra.* See also *Nixon* v. *Herndon, supra; Nixon* v. *Condon, supra; Grovery* v. *Townsend*, 295 U. S. 45; and *Smith* v. *Allwright, supra.*

Petitioners respectfully submit that all controlling doctrines of constitutional law require that they be afforded a hearing on the merits.

ARGUMENT

The Issue Before the Court

At the risk of stressing the obvious, there should be no doubt concerning the issues here for decision. It is premature to consider the nature of the proof necessary to establish petitioners' contentions. All that is presently involved is whether the complaint states a justiciable case or controversy which should be resolved by the trial court. The basis of the major opinion of the Court of Appeals seems to be that petitioners have failed to make out such a cause (R. 34-42). The concurring opinion apparently concedes that a valid cause of action has been stated but concludes that federal jurisdiction should be withheld, because the remedy would be worse than the evil the court is asked to correct (R. 65-73). Both contentions, petitioners respectfully submit, are untenable, and it was error for the District Court not to resolve in a hearing on the merits the questions raised in petitioners' complaint.

The Claimed Violations of the Fourteenth and Fifteenth Amendment Guarantees Here Alleged Entitled Petitioners to a Hearing on the Merits

Petitioners allege in their complaint a purposeful state imposed discrimination which deprives them as Negroes of rights and benefits of residence in Tuskegee, Alabama, including the right to vote in Tuskegee municipal elections. They contend that these deprivations have been accomplished by enforcement of Act 140 which is directed against them and all other Negroes similarly situated, simply because they are Negroes and for no other reason. Unquestionably, if the discrimination charged is racial in origin, a *prima facie* showing of infractions of both the Fourteenth and Fifteenth Amendments has been made. As such, a claim of grave constitutional importance is presented. See *Guinn* v. *United States*, 238 U. S. 347; *Smith* v. *Allwright*, 321 U. S. 647; *Terry* v. *Adams*, 345 U. S. 461; *United States* v. *Thomas*, 362 U. S. 58; *Smith* v.

Texas, 311 U. S. 128; *Hernandez* v. *Texas*, 347 U. S. 475; *Shepherd* v. *Florida*, 341 U. S. 50; *Takahashi* v. *Fish & Game Commission*, 334 U. S. 410; *Oyama* v. *California*, 332 U. S. 633; *Shelley* v. *Kraemer*; *Sweatt* v. *Painter*, 339 U. S. 629; *Brown* v. *Board of Education*, 347 U. S. 483; *Gayle* v. *Browder*, 352 U. S. 903; and *Cooper* v. *Aaron*, 358 U. S. 1; *State Athletic Commission* v. *Dorsey*, 359 U. S. 533.

Petitioners are among a group of former Negro residents of Tuskegee, Alabama. Before the enactment of Act 140, Negroes out-numbered whites approximately 5-1 and constituted 2 5's of the qualified voting population. Obviously, Negroes had become an important political force in this municipality, and in time seemed destined to exercise a controlling influence over the local governmental machinery. Even a surface understanding of race relations in this country makes unmistakably clear that efforts to avoid this very result are the roots of much of the invidious racial discrimination which has been practiced in the United States for so long a time.

Faced with the inevitability of future Negro dominance if present conditions prevailed, the challenged statute was enacted to prevent that prospective eventuality. No other reason for the legislation has been offered or established. While admittedly the Constitution does not secure the right of Negroes or of any other group or class to exercise political influence in a community, it does bar the nullification of that influence by the erection of color or caste distinctions.

Residence in Tuskegee has important benefits, not the least of which, in these circumstances, are the relatively intangible attributes of status and convenience. The fact that some of the benefits of municipal residence may be largely intangible and not subject to exact measurement or definition does not mean that in respect to their enjoyment, states are free to practice racial discrimination. See *Sweatt* v. *Painter*, *supra*; *McLaurin* v. *Oklahoma State Regents*, 339 U. S. 637.

Obviously the confines and limits of Tuskegee or of any other town, district, village or municipality in the State of Alabama may be determined by the Alabama Legislature. Petitioners accept as settled the principle that there is no abstract constitutional right to residence in a particular municipality or to the benefits incident thereto. Such matters are of local concern, except where the confines and limits are established in contravention of the guarantees of the federal Constitution, see *Schware* v. *Board of Bar Examiners*, 353 U. S. 232; *Konigsberg* v. *State Bar*, 353 U. S. 252, or the rights and benefits of municipal residence are denied or interfered with because of race. Cf. *Buchanan* v. *Warley*, 245 U. S. 60; *City of Richmond* v. *Deans*, 281 U. S. 704; *Shelley* v. *Kraemer*, *supra*; *Oyama* v. *California*, *supra*.

The fact that the discrimination effected does not appear on the face of the statute is of little significance. If the unlawful discrimination comes as a result of enforcement or administration of the law, it is unconstitutional despite the fact that the legislation may be innocuous in terms. See *Yick Wo* v. *Hopkins*, 118 U. S. 356. Cf. *Shuttlesworth* v. *Birmingham Board of Education*, 358 U. S. 101.

Moreover, the Constitution's censure could scarcely be affected by the fact that the state seeks to accomplish the forbidden discrimination and disenfranchisement through exercise of its power to rechart and redefine one of its geographical subdivisions. Indeed, a state's reliance upon the plenary nature of its power to redefine the boundaries of a municipality under its jurisdiction to avoid the reach of the Fourteenth or Fifteenth Amendment must be regarded as ineffective, petitioners respectfully submit, as are the attempts to evade the restriction against placing undue burdens on interstate commerce by "invoking the convenient apologetics of the police power." *Morgan* v. *Virginia*, 328 U. S. 373, 380; *Kansas City S. R. Co.* v. *Kaw Valley Drainage District*, 233 U. S. 75, 79.

The controlling factor determinative of the application of Fourteenth or Fifteenth Amendment proscriptions is whether the deprivations complained of can be said to result from the action of the state. See *Home Tel. & Tel. Co.* v. *Los Angeles*, 227 U. S. 278; *Screws* v. *United States*, 325 U. S. 91; *Shelley* v. *Kraemer, supra.* Where the action is that of the state, the form it takes or the source from which it emanates is immaterial, in ascertaining whether constitutional guarantees have been violated. See *Screws* v. *United States supra; N. A. A. C. P.* v. *Alabama*, 357 U. S. 449. *Terry* v. *Adams, supra.*

In *Cooper* v. *Aaron, supra* and more recently in *United States* v. *Raines*, 362 U. S. 17, this Court took occasion to emphasize that state and local officials are bound by the prohibitions of the Fourteenth and Fifteenth Amendments. Whatever contrary impression the broad language of *Hunter* v. *Pittsburgh*, 207 U. S. 161; or *Laramie County* v. *Albany County*, 92 U. S. 317, may give, it is no longer disputed that all governmental authority in this country is subject to the limitations set out in the Constitution of the United States. See *United States* v. *Mitchell*, 330 U. S. 75, 100; *Wieman* v. *Updegraff*, 344 U. S. 182, 191, 192; *Cooper* v. *Aaron, supra.*

There can be no doubt that a statute expressly prohibiting Negroes from living in certain areas of a city or certain towns, municipalities or districts of a state violates both the due process and equal protection clauses of the Fourteenth Amendment. *Buchanan* v. *Warley, supra; City of Richmond* v. *Deans, supra.* It is also clear that a statute expressly barring qualified Negroes from the polls in municipal elections offends both the equal protection clause of the Fourteenth Amendment, *Nixon* v. *Herndon, supra; Nixon* v. *Condon, supra*, and the prohibitions of the Fifteenth Amendment as well, *Smith* v. *Allwright, supra; Terry* v. *Adams, supra.* It necessarily

follows that "evasive schemes" designed to achieve the same result are similarly forbidden. *Cooper* v. *Aaron, supra.*

In 1959, the United States Commission on Civil Rights filed a report in which it clearly established that in many areas of the United States disenfranchisement based upon race or color was still a common practice. (Report of the United States Commission on Civil Rights, 1959, pp. 19-142). Chief among these areas in which such disenfranchisement occurred was the State of Alabama and the County of Macon (*Id.* 69-97, particularly pp. 90-92). Plans are now being readied in Alabama for the elimination of Macon County, which has a large Negro population, as a next step to make certain that the Negro remains politically impotent. Viewed against this background, it becomes readily apparent that Act 140 is a part of a state policy of wholesale disenfranchisement and discrimination to insure maintenance of the *status quo* in Negro-white relations.

Protection of the integrity of the electoral process against prohibitions and burdens based upon race has been of major concern to this Court in its effort to reduce to practical effectiveness the guarantees against discrimination and disenfranchisement which the Fourteenth and Fifteenth Amendments afford. *Guinn* v. *United States, supra; Lane* v. *Wilson, supra; Nixon* v. *Herndon, supra; Nixon* v. *Condon, supra; Smith* v. *Allwright, supra; Terry* v. *Adams; supra; Cooper* v. *Adams, supra.* See also, *Davis* v. *Schnell,* 81 F. Supp. 872 (S. D. Ala., 1949). aff'd, 336 U. S. 993.

In recent years the Congress and the Executive Branch of the national government have taken steps to eliminate local restrictions which have heretofore successfully prevented Negroes from full participation in the electoral process. The evident purpose of the Civil Rights Act

of 1957 (71 Stat. 637, Title 42, United States Code, Section 1971) was to eliminate the disenfranchisement of Negroes, and the Civil Rights Act of 1960 (Act of May 6, 1960, Public Law, No. 86-449) gives the federal government additional power to accomplish this objective. Pursuant to this authority, litigation has been instituted in several states to aid Negroes in their efforts to become qualified electors. Some of these cases have already reached this Court, *e.g.*, *United States* v. *Raines, supra; United States* v. *Thomas, supra,* and similar litigation is in the offing.

Thus, the elimination of racial disenfranchisement pursuant to the full implementation of the guarantees of the Fifteenth Amendment is one of the principal aims of national policy. Based upon these factors it would appear that petitioners' claims are not only fully imbedded in the fabric of constitutional law but affect the national interest as well.

It is respectfully submitted, therefore, that these are the compelling and controlling considerations which entitle petitioners to a hearing on the merits. Only had it been unquestioned that the discriminations claimed could not have been demonstrated under any circumstances could the judgment below have been warranted. Obviously, at this stage of the proceeding that conclusion cannot be reached.

The Considerations Which Underlay Decision in *Colegrove* v. *Green* and Cognate Cases Are Not Applicable Here

In *Colegrove* v. *Green*, 328 U. S. 549, congressional districting in Illinois pursuant to a 1901 statute was challengd on the grounds that because of the substantial population disproportion involved, the statute violated the equal protection clause of the Fourteenth Amendment. Relief

was denied on the authority of *Wood* v. *Broom*, 287 U. S. 1, which had interpreted the Federal Reapportionment Act of 1929 (Title 2, United States Code, Section 2a) as making no requirement in respect to "compactness, contiguity and equality in population of districts." The principal ground on which the decision rested, however, was that apportionment necessitated "embroilment in politics, in the sense of party contests and party interests." The federal courts were admonished to stay clear of "this political thicket."

Similarly, relief was denied in *MacDougall* v. *Green*, 335 U. S. 281, where another Illinois statute required petitions to form and to nominate candidates for new political parties to have a certain number of signatures of qualified voters from at least 50 of the state's 102 counties, notwithstanding the fact that 52% of the state's registered voters were to be found in Cook County; that 89% of the state's population lived in 49 counties, and that only 13% lived in the 53 least populous counties. This Court found nothing unconstitutional in a state policy requiring that candidates for statewide offices secure statewide support.

In *South* v. *Peters*, 339 U. S. 296, a challenge to the Georgia county unit vote system was also unsuccessful. In a per curiam opinion the Court stated that the equity powers of the federal courts should not be exercised "in cases posing political issues arising from a state's geographical distribution of electoral strength among its political subdivisions."

In *Colegrove*, *MacDougall* and *Peters*, the Court was fearful of involving itself in partisan party politics, and the inequalities alleged raised arguable issues concerning appropriate distribution of a state's political strength as between the more and the less populous areas. Moreover, corrective legislation was a distinct possibility.

Here, however, Alabama is redrawing the boundaries of one municipality in order to deprive Negroes of local politi-

cal power. The validity of statewide districting or general distribution of the state's electoral strength is not in question. The unfreighted issue raised is whether a state may deny Negro citizens rights secured under the Constitution and laws of the United States. As petitioners stated at the outset, this same issue has been before this Court on many occasions and in many guises. Embroilment in political partisanship is not to be feared. The constitutional validity of a form of state enforced racial discrimination is the sole problem petitioners bring here.

It must also be remembered that the primary intendment of the Fourteenth and Fifteenth Amendments was to secure to Negroes full citizenship rights and to prohibit state action discriminating against them as a class on account of their race. See *Slaughter House Cases*, 16 Wall. 36. There speaking of the Thirteenth, Fourteenth and Fifteenth Amendments, this Court, at pps. 71, 72, said:

> . . . no one can fail to be impressed with the one pervading purpose found in them all . . . we mean the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly made freemen and citizen from the oppressions of those who had formerly exercised unlimited dominion over him. It is true that only the 15th Amendment, in terms, mentions the negro by speaking of his color and his slavery. But it is just as true that each of the other articles was addressed to the grievances of that race, and designed to remedy them as the fifteenth.

It would be strange indeed for this Court to hold that federal courts are powerless to afford redress, when a claimed violation of these basic guarantees is alleged, simply

because the violation results from the remapping of a municipality. Petitioners contend that such a conclusion would be completely at variance with all that is fundamental in the Court's interpretation of the reach and effect of the Fourteenth and Fifteenth Amendments. See *Cooper* v. *Aaron, supra.* And see *Muir* v. *Louisville Park Theatrical Association,* 202 F. 2d 275 (CA 6th 1953), vacated and remanded, 344 U. S. 971. The import of this Court's holdings is that all state acts of racial discrimination or disenfranchisement are beyond the pale.

Moreover, no delicate issue of federal-state relationship is present in the instant case. The Constitution forbids what Alabama is attempting to do, and if petitioners can sustain their allegations, Act 140 must be struck down. This case differs strikingly from *Colegrove* in another important particular. There, it was possible for this Court to conclude that the complainants could successfully appeal to the legislature for correction of the complained of evil. No such conclusion is tenable in the circumstances of this case. The basic reason which brought Act 140 into being was to prevent petitioners and other Negroes from consolidating their growing political strength at the local level and thereby exerting influence over the state legislature. Also, it should be added, this controversy does not involve conflicting views concerning permissible state policy. On the contrary, the Fourteenth and Fifteenth Amendments place absolute limitations on state power, and where the state has exceeded those limitations to petitioners' detriment, redress may be sought in the federal courts. See *Cooper* v. *Aaron, supra.*

One final distinction should be emphasized. Relief presents no special or peculiar difficulties. The trial court is not required to remap Tuskegee. If it is determined that Act 140 is invalid, it will be struck down and Tuskegee will revert to its old boundaries. Needless to say, the state may

give Tuskegee new limits by enacting another statute. This may necessitate litigation testing the validity of that legislation. But that prospect is not new, see, e.g., *Guinn* v. *United States, supra;* and *Lane* v. *Wilson, supra; Nixon* v. *Herndon, supra; Nixon* v. *Condon, supra; Grovey* v. *Townsend, supra; Smith* v. *Allwright, supra,* and has never been a basis for this Court refusing to apply applicable constitutional doctrine.

CONCLUSION

For the reasons hereinabove stated, it is respectfully submitted that the judgment below should be reversed.

ROBERT L. CARTER
20 West 40th Street
New York, New York

FRED D. GRAY
34 North Perry Street
Montgomery, Alabama

ARTHUR D. SHORES
1527 Fifth Avenue, North
Birmingham, Alabama

Attorneys for Petitioners.

IRMA ROBBINS FEDER,
of Counsel.

No. 32

In the Supreme Court of the United States

OCTOBER TERM, 1960

C. G. GOMILLION, ET AL., PETITIONERS

v.

PHIL M. LIGHTFOOT, AS MAYOR OF THE CITY OF TUSKEGEE, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

J. LEE RANKIN,
Solicitor General,
HAROLD R. TYLER, JR.,
Assistant Attorney General,
PHILIP ELMAN,
DANIEL M. FRIEDMAN,
Assistants to the Solicitor General,
HAROLD H. GREENE,
D. ROBERT OWEN,
J. HAROLD FLANNERY, JR.,
Attorneys,
Department of Justice, Washington 25, D.C.

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STATEMENT

Petitioners, Negro citizens, filed a complaint (R. 2–9) in the United States District Court for the Middle District of Alabama alleging that a 1957 Act of the State of Alabama (Act 140) changing the boundaries of the City of Tuskegee, Alabama, deprived them, "on account of their race and color" (R. 7–8), of their right to vote in Tuskegee municipal elections and of certain municipal services,[1] in vio-

[1] It was alleged (R. 7) that petitioners have been deprived of the services of city policemen to patrol school-zoned areas during certain hours, the benefits of general street improvement, and the paving of a certain street as promised by the city prior to the passage of the Act.

lation of the due process and equal protection clauses of the Fourteenth and Fifteenth Amendments.[1] The defendants are officials of Tuskegee and of Macon County, in which it is located (R. 4–5). The relief sought was (1) an adjudication that, as applied to petitioners, the Act is unconstitutional as charged; and (2) that the defendants be enjoined from enforcing the Act against petitioners and others similarly situated, and from denying them "the right to vote in Tuskegee municipal elections, and to be recognized and treated in all respects as citizens of the City of Tuskegee" (R. 8–9). The district court dismissed the complaint on the ground that it had no authority to invalidate Act 140, and the Court of Appeals for the Fifth Circuit affirmed by a divided court.

The pertinent allegations of the complaint—which must be accepted as true for purposes of testing its sufficiency—are as follows:

Prior to Act 140, Tuskegee was a square-shaped city containing approximately 5,397 Negroes and approximately 1,310 white persons. Approximately 400 Negroes and 600 white persons were qualified voters in the city. As a result of the altering of the city's boundaries by Act 140, several thousand Negroes, including all but 4 or 5 qualified voters, have been "excluded or 'removed'" from the city. No white persons were removed. "As redefined by said Act 140, Tuskegee resembles a 'sea dragon', with Negro neighborhoods, including the site of the Tuskegee In-

[1] The action was brought as a class suit on behalf of petitioners and all other Negro citizens who reside within the city limits of Tuskegee as they existed prior to Act 140 (R. 3–4).

stitute, eliminated" (R. 5). (A map showing the changes made in the configuration of the city by Act 140 is included at pages 12–13 of the record.)

Although Act 140 "recites no reasons for the change in boundaries * * * its necessary effect and obvious purpose" (R. 5) was to deprive plaintiffs "on account of their race and color" of their "right to vote" in Tuskegee municipal elections, to deny them "their rights to effective participation in Tuskegee's municipal affairs" (R. 8), and to deprive them of certain municipal services (R. 7). "Act No. 140 is another device in a continuing attempt on the part of the State of Alabama to disenfranchise Negro citizens" (R. 6).[3]

The district court dismissed the complaint on the ground that "regardless of the motive of the Legislature of the State of Alabama and regardless of the effect of its actions, insofar as these plaintiffs' right to vote in the municipal elections is concerned, this Court has no authority to declare said Act invalid after

[3] The complaint stated (R. 6–7) that Macon County had no Board of Registrars for more than 18 months between January, 1956, and June, 1957, for the reason that "almost all of the white persons possessing the qualification to vote in said County are already registered, whereas thousands of Negroes, who possess the qualifications, are not registered and cannot vote"; that Act 140 was introduced into the Alabama Legislature by State Senator Sam Engelhardt of Macon County, who was then Executive Secretary for the White Citizens' Council for Alabama, "an organization dedicated to the principles of white supremacy and prevention of integration of the white and Negro races"; and that a local newspaper article, published shortly before the bill was introduced, "cited the 'obvious' purpose of the bill, *i.e.*, 'to assure continued white control in Tuskegee City elections.'"

measuring it by any yardstick made known by the Constitution of the United States," and has no "control" or "supervision over, and no power to change any boundaries of municipal corporations fixed by a duly convened and elected legislative body, acting for the people in the State of Alabama" (R. 30).

In affirming, the majority opinion of the court of appeals concluded (R. 41) that

> in the absence of any racial or class discrimination appearing on the face of the statute, the courts will not hold an act, which decreases the area of a municipality by changing its boundaries, to be invalid as violative of the Fourteenth and Fifteenth Amendments to the United States Constitution, although it is alleged that the enactment was made for the purpose, not appearing in the Act, and with the effect of excluding or removing Negroes from the City and depriving them of the privileges and benefits of municipal membership, including the right to vote in City elections.

Judge Brown, dissenting, was of the view that "the courts are open to hear and determine the serious charge here asserted" (R. 43). He stated that because the redistricting of Tuskegee and prescribing the qualifications for voting in its municipal elections "are solely, or primarily, the initial concerns of Alabama alone does not mean that when it acts it may act without regard for the Constitution" (R. 49–50); and that it is of "little significance" that Act 140 "does not * * * demonstrate on its face that [it] is directed at the Negro citizens of that community. If the Act is discriminatory in purpose and effect,

'whether accomplished ingeniously or ingenuously' [it] cannot stand" (R. 57).

ARGUMENT

If a state statute expressly prohibited Negroes in a particular city from voting in municipal elections, or denied them municipal services available to white residents of the city, we think it beyond dispute that any court in the country would invalidate it as an obviously unconstitutional abridgment of the rights of Negro citizens guaranteed by the Fourteenth and Fifteenth Amendments. The issue in this case is whether the Alabama statute which, according to the allegations of the complaint, is designed to, and does, achieve the same result, is beyond judicial review because that result is accomplished by changing the boundaries of the City of Tuskegee rather than by affirmatively imposing such prohibitions. Stated differently, the question is whether the State of Alabama can use its admittedly broad power to define the boundaries of its municipalities as a method for accomplishing indirectly what it could not do directly, namely, depriving its Negro citizens of their constitutional rights because of their race.

The majority opinion below held (R. 41) that, since the "enactment by a state legislature of a statute creating, enlarging, diminishing or abolishing a municipal corporation is * * * a political function", the courts will not, "in the absence of any racial or class discrimination appearing on the face of the statute," hold a statute "which decreases an area of a municipality by changing its boundaries" invalid under the Fourteenth

and Fifteenth Amendments, even though it is alleged "that the enactment was made for the purpose * * * and with the effect of excluding or removing Negroes from the City and depriving them of the privileges and benefits of municipal membership, including the right to vote in City elections." We shall show, however, that the allegations of this complaint go far beyond "political questions" which courts have frequently refused to decide; and that the grounds upon which courts abstain from involvement in "political questions" are not applicable where, as here, the denial of constitutional rights is allegedly based on the facts that the victims of the discrimination are Negroes. We shall further show that, once it be established that this is an appropriate case for judicial intervention, the allegations of the complaint, if proven, clearly establish a violation of petitioners' constitutional rights and warrant the relief sought.

1. The leading recent case in this Court dealing with "political questions" involving the electoral process is *Colegrove* v. *Green,* 328 U.S. 549. This Court there upheld the dismissal of a complaint challenging the constitutionality of the apportionment of Congressional districts in Illinois. The complaint charged that, by reason of subsequent changes in population, the Congressional districts that Illinois had created in 1901 were invalid, and it sought, in effect, to enjoin the state officials from conducting the 1946 Congressional elections on the basis of the 1901 districts. Mr. Justice Frankfurter, in an opinion in which Justices Reed and Burton concurred, stated (p. 552) that this

Court "from time to time" "has refused to intervene in controversies" of this character "because due regard for the effective working of our Government revealed this issue to be of a peculiarly political nature and therefore not meet for judicial determination." The opinion pointed out that "[t]he basis for the suit is not a private wrong, but a wrong suffered by Illinois as a polity" (p. 552); that a court cannot "affirmatively re-map the Illinois districts so as to bring them more in conformity with the standards of fairness for a representative system" but, "[a]t best", "could only declare the existing electoral system invalid"—the result of which "would be to leave Illinois undistricted and to bring into operation, if the Illinois legislature chose not to act, the choice of members for the House of Representatives on a state-wide ticket" (p. 553); that "this controversy concerns matters that bring courts into immediate and active relations with party contests," issues from which "this Court has traditionally held aloof" (*ibid.*); and that the "remedy for unfairness in districting is to secure State legislatures that will apportion properly, or to invoke the ample powers of Congress" (p. 556). "Courts ought not to enter this political thicket" (*ibid.*).

Subsequently, in affirming the dismissal of a suit challenging the constitutionality of Georgia's county unit system, this Court stated that "Federal courts consistently refuse to exercise their equity powers in cases posing political issues arising from a state's geographical distribution of electoral strength among

its political subdivisions." *South* v. *Peters*, 339 U.S. 276, 277.

None of these considerations in favor of judicial abstention is, however, applicable to the violations of petitioners' constitutional rights charged in the instant case.

The disenfranchisement here is not the result of a long-term population shift, but of a particular statute allegedly directed against a particular group solely because of its race. Cf. *infra*, pp. 14–18. Furthermore, the racial aspect of the discrimination is not merely one of the effects of the Act (cf. *South* v. *Peters, supra*), but is its basic vice. Therefore, here, unlike *Colegrove*, "[t]he basis for the suit *is* * * * a private wrong" (emphasis added). The alleged wrong has not been suffered by the State of Alabama "as a polity," but by these petitioners, who allege that as a result of the Alabama Act they "are suffering irreparable injury to *their* rights to vote, to free speech, press, and petition, and to property" (R. 8; emphasis added). These rights "are personal rights" (*Shelley* v. *Kraemer*, 334 U.S. 1, 22). This Court has examined on the merits even non-racial cases involving state distribution of political power where the personal rights of a particular group were directly impinged. *MacDougall* v. *Green*, 335 U.S. 281.

In *Colegrove*, invalidation of "the existing electoral system" involved would have left Illinois "undistricted" and, if the Illinois legislature did not act, might have "defeat[ed] the vital political principle which led Congress, more than a hundred years ago,

to require districting" (p. 553). Invalidation of Alabama Act 140, however, would do no more than restore the situation as it existed prior to the summer of 1957—namely, the Negro community of Tuskegee would again become a part of that City, and would again be able to exercise the voting and other civic rights which it had previously enjoyed.

Finally, and perhaps most significant of all, this case does not involve "matters that bring courts into immediate and active relations with party contests" and would not "involve the judiciary in the politics of the people" (*Colegrove*, at pp. 553–554); and it does not pose "political issues arising from a state's geographical distribution of an electoral strength among its political subdivisions" (*South* v. *Peters*). For although Law 140 on its face purports merely to "alter, re-arrange, and re-define the boundaries of the City of Tuskegee" (R. 9), the complaint alleges that its true purpose and effect is to deny petitioners, "on account of their race and color," their voting and other constitutional rights guaranteed by the Fourteenth and Fifteenth Amendments. Particularly in the field of civil rights, this Court has repeatedly looked beneath the surface of innocuous-appearing legislation to determine its true intent and effect, and has tested its constitutionality on the basis of what it actually does, not what it merely says. *E.g.*, *Yick Wo* v. *Hopkins*, 118 U.S. 356; *Guinn* v. *United States*, 238 U.S. 347, 364–365; *Myers* v. *Anderson*, 238 U.S. 368; *Korematsu* v. *United States*, 323 U.S. 214, 216; see *Lassiter* v. *Northampton Election Board*, 360 U.S.

45, 53. "[T]he constitutional rights of [petitioners] not to be discriminated against * * * on grounds of race or color * * * can neither be nullified openly and directly by state legislators * * * nor nullified indirectly by them through evasive schemes * * * whether attempted 'ingeniously or ingenuously'" (*Cooper* v. *Aaron*, 358 U.S. 1, 17). Thus, in *Myers* v. *Anderson, supra,* this Court struck down a Maryland statute which required, as a condition to voting in municipal elections, that the voter or his ancestor must have voted prior to a certain date. Although innocuous on its face, this condition was invalidated because its clear effect and design was to disfranchise Negro citizens.

If there is one area from which "this Court has traditionally [not] held aloof" (*Colegrove*), it has been attempts by the States to discriminate against members of the Negro race. In one of the first cases which arose under the Fourteenth Amendment (*Strauder* v. *West Virginia,* 100 U.S. 303), this Court, in striking down a state statute that excluded Negroes from serving on juries, unequivocally stated (p. 307) that the Fourteenth Amendment

> declar[es] that the law in the States shall be the same for the black as for the white; that all persons, whether colored or white, shall stand equal before the laws of the States, and, in regard to the colored race, for whose protection the amendment was primarily designed, that no discrimination shall be made against them by law because of their color.

See, also, the cases cited *infra,* pp. 14–16.

In short, *Colegrove* and *South* v. *Peters* dealt with the "political question" of the diminution of the effectiveness of voting rights in certain geographical areas resulting from lack of redistricting. They "dealt not with racial discrimination at the ballot box" (*Terry* v. *Adams*, 345 U.S. 461, 481, opinion of Mr. Justice Clark) or in the provision of municipal services. Thus, assuming *arguendo* the correctness of the holdings in those cases that the question there involved was not judicially cognizable (but see Lewis, *Legislative Apportionment and the Federal Courts*, 71 Harv. L. Rev. 1057), they are not applicable to the instant case. For it does not involve a "political question," but the power of the State of Alabama to use the device of the gerrymander to deprive Negro citizens of their constitutional rights guaranteed by the Fourteenth and Fifteenth Amendments.

There is no magic in the words "apportionment" or "redistricting" which includes an immunity from judicial review. Cases involving purely political questions may fall within a special area of governmental concern which judges should refrain from entering; but it does not follow that every legislative "apportionment" or "redistricting" is automatically such a case. If a state were to gerrymander its school districts in such a way as to continue racial segregation of pupils, and for that very purpose, we cannot conceive that this Court would hold it outside the judicial power to review such action, even though the "redistricting" was overtly cast in terms of geographical boundaries and there was no explicit reference to race. The same considerations apply here.

2. Mr. Justice Frankfurter's opinion in *Colegrove* also adverted to the problems of relief in political cases. He stated (pp. 552–553) that petitioners were "ask[ing] of this Court what is beyond its competence to grant," since "no court can affirmatively re-map the Illinois districts so as to bring them more in conformity with the standards of fairness for a representative system." The relief issue also looms large in the concurring opinion of Judge Wisdom below. He stated (R. 66) that since "[c]ourts, any courts, are incompetent to remap city limits", petitioners "ask for something courts cannot give"; and that "any decree in this case purporting to give relief would be a sham: the relief sought will give no relief." "[T]here is no effective remedy" (R. 72).

We submit that Judge Wisdom is in error in concluding that relief cannot here be provided. Petitioners do not, as he suggests (R. 72), ask the court to undertake "the determination of * * * boundaries" of "political subdivisions of the state" (R. 71). They ask only for an adjudication that this particular alteration of the boundaries of Tuskegee, alleged to be part of "a continuing attempt on the part of the State of Alabama to disenfranchise Negro citizens" (R. 6), violates the Fourteenth and Fifteenth Amendments; and that the state officials be enjoined from enforcing the Act against them and from denying them the right to vote in Tuskegee municipal elections (R. 8–9). Thus, the relief here requested is fundamentally the same as that recognized as appropriate in *Smiley* v. *Holm*, 285 U.S. 355, namely, the power of an equity court "to declare a state apportionment

bill invalid and to enjoin state officials from enforcing it" (Mr. Justice Black, dissenting, in *Colegrove* v. *Green*, 328 U.S. at 573).

It is of course true, as Judge Wisdom pointed out (R. 72), that if the court declares Act 140 invalid, "[t]here is nothing to prevent the legislature of Alabama from adopting a new law redefining Tuskegee town limits, perhaps with small changes, or perhaps a series of laws, each of which might also be held unconstitutional * * *." But it cannot fairly be assumed that, if this Act is declared unconstitutional, the State of Alabama will endeavor to evade that ruling by reenacting the same law with "small changes" in the city boundaries. In any event, the court can certainly give effective relief against this statute, and that is enough to allow petitioners to go to trial. While the relief sought in this case may not protect petitioners against future attempts by the state to achieve the same illegal result by similar means, it can nevertheless effectively eliminate the deprivation of constitutional rights resulting from this statute. No more is necessary to warrant a court of equity hearing the case on the merits. It is time enough to worry about future cases involving minor modifications of the statute if and when they arise.

Indeed, in the delicate constitutional area here involved, the mere declaration by a court that the state cannot wipe out petitioners' voting rights by gerrymandering, is itself an important element of relief. For such a ruling will necessarily have a salutary effect in discouraging future attempts in other areas to employ like devices for denying the right to vote.

"Where * * * it is clear that the action of the state violates the terms of the fundamental charter, it is the obligation of this Court so to declare" (*Shelley* v. *Kraemer,* 334 U.S. 1, 23). On the other hand, a holding that the courts are powerless to intervene in this situation would provide a new and dangerous method for avoiding the constitutional mandate that "[t]he right of citizens of the United States to vote shall not be denied or abridged * * * by any State on account of race [or] color * * *."

3. Once it be established that this case does not involve the kind of "political question" that is not subject to judicial scrutiny, there can be no doubt that the complaint sets forth a clear violation of the constitutional prohibitions of the Fourteenth and Fifteenth Amendments.

Petitioners allege (R. 7–8) that they have been gerrymandered out of the City of Tuskegee "on account of their race and color." Although "[s]tates may do a good deal of classifying that it is difficult to believe rational, * * * there are limits, and it is too clear for extended argument that color cannot be made the basis of a statutory classification affecting the right set up in this case [right to vote]" (Mr. Justice Holmes, in *Nixon* v. *Herndon,* 273 U.S. 536, 541).

This basic constitutional precept that Negroes cannot be singled out and treated differently because of their race and color is fundamental to our democracy. It has repeatedly been reasserted and applied in a long list of cases that have unequivocally condemned, in whatever form, attempts by the states to deny Negro

citizens their constitutional rights. Since *Brown* v. *Board of Education*, 347 U.S. 483, held segregation in the public schools to be unconstitutional, this Court and the lower federal courts have condemned segregation in a wide variety of public facilities, including beaches and bathhouses,[4] golf courses,[5] restaurants in public buildings,[6] intrastate bus lines,[7] parks and recreational areas,[8] and public theatres.[9] It would make a mockery of all of these cases now to hold that the states can create a segregated community of Negro citizens. The effect would be to enable the states, by

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[4] *Dawson* v. *Mayor and City Council of Baltimore City*, 220 F. 2d 386 (C.A. 4), affirmed, 350 U.S. 877; see also *City of Petersburg* v. *Alsup*, 238 F. 2d 830 (C.A. 5), certiorari denied, 353 U.S. 922.

[5] *Holmes* v. *City of Atlanta*, 350 U.S. 879, reversing, 223 F. 2d 93 (C.A. 5); see also *Moorhead* v. *City of Ft. Lauderdale*, 152 F. Supp. 131 (S.D. Fla.), affirmed, 248 F. 2d 544 (C.A. 5); *Ward* v. *City of Miami*, 151 F. Supp. 593 (S.D. Fla.) affirmed, 252 F. 2d 787 (C.A. 5); *Holley* v. *City of Portsmouth*, 150 F. Supp. 6 (E.D. Va.); *Hayes* v. *Crutcher*, 137 F. Supp. 853 (M.D. Tenn.); *Augustus* v. *City of Pensacola*, 1 R.R.L.R. 681.

[6] *Derrington* v. *Plummer*, 240 F. 2d 922 (C.A. 5), certiorari denied, 353 U.S. 924.

[7] *Gayle* v. *Browder*, 352 U.S. 903, affirming, 142 F. Supp. 707 (M.D. Ala.).

[8] *New Orleans City Park Improvement Association* v. *Detiege*, 358 U.S. 54, affirming, 252 F. 2d 122 (C.A. 5). See also *Lonesome* v. *Maxwell*, 220 F. 2d 386 (C.A. 4); *Augustus* v. *City of Pensacola*, *supra*; *Moorman* v. *Morgan*, 285 S.W. 2d 146 (Ky.).

[9] *Muir* v. *Louisville Park Theatrical Ass'n.*, 347 U.S. 971, reversing 202 F. 2d 275 (C.A. 6) and remanding for consideration in light of *Brown* v. *Board of Education* and "conditions that now prevail." See also *Henry* v. *Greenville Airport Commission* (C.A. 4), decided April 20, 1960 (waiting room in a municipal airport).

the simple device of redrawing municipal boundaries, to bar Negroes from enjoying many of the public facilities that have been finally opened to them only after protracted and difficult litigation. The ghetto has no place in American life, and the Fourteenth Amendment prohibits state enactments, the "purpose * * * and * * * ultimate effect" of which are "to require by law, at least in residential districts, the compulsory separation of the races on account of color" (*Buchanan* v. *Warley*, 245 U.S. 60, 81).

The fact that the forbidden discrimination is accomplished through the exercise of the state's admittedly broad power to redefine municipal boundaries cannot save this Act. For "all * * * state activity, must be exercised consistently with federal constitutional requirements as they apply to state action" (*Cooper* v. *Aaron*, 358 U.S. 1, 19), and the Fourteenth and Fifteenth Amendment each "refers to exertions of state power in all forms" (*Shelley* v. *Kramer*, 334 U.S. 1, 20). It is undisputed that Act 140 eliminated from the City of Tuskegee its Negro neighborhoods and all but 4 or 5 of its approximately 400 Negro voters, but eliminated no white voters. Petitioners allege (R. 6) that the Act "is another device in a continuing attempt on the part of the State of Alabama to disenfranchise Negro citizens."[10] No other reason

[10] The difficulties that Negro citizens of Macon County, Alabama, have had in attempting to register are well known. See *Mitchell* v. *Wright*, 154 F. 2d 924 (C.A. 5), certiorari denied, 329 U.S. 733; Report of the United States Commission on Civil Rights, 1959 (Government Printing Office), pp. 75–76.

than disenfranchisement of the Negroes of Tuskegee has been given for the Act. See New York Times, March 2, 1960, p. 28, col. 7–8. In these circumstances, we submit that it is immaterial that there is no "racial or class discrimination appearing on the *face* of the statute" (R. 41; emphasis added). For the issue is not whether petitioners' rights were denied in "express terms," but whether they were "denied in substance and effect" (*Norris* v. *Alabama*, 294 U.S. 587, 590).[11]

In "substance and effect" the State of Alabama, under the guise of merely changing the boundaries of Tuskegee, has denied a substantial number of Negro citizens important rights which white citizens in the same area continue to enjoy. The attempt by the State of Alabama to deny the Negro citizens of Tuskegee their right to vote flies in the face of this Court's admonition in *Smith* v. *Allwright*, 321 U.S. 649,

[11] To the same effect, see *Bailey* v. *Alabama*, 219 U.S. 219, 244; *Yick Wo* v. *Hopkins*, 118 U.S. 356, 373–374; *Ho Ah Kow* v. *Nunan*, 5 Sawyer 552, 560–564 (Circuit Court of California); *Cooper* v. *Aaron*, 358 U.S. 1; *Terry* v. *Adams*, 345 U.S. 461; *Smith* v. *Allwright*, 321 U.S. 649; *Miller* v. *Milwaukee*, 272 U.S. 713, 715; *Home Insurance Co.* v. *New York*, 134 U.S. 594; *Henderson* v. *Mayor of New York*, 92 U.S. 259; *Frost Trucking Co.* v. *Railroad Commission*, 271 U.S. 583; *Rice* v. *Elmore*, 165 F. 2d 387, 392 (C.A. 4), certiorari denied, 333 U.S. 875; *Baskin* v. *Brown*, 174 F. 2d 391, 393 (C.A. 4). And in order to discern purpose, the courts do not hesitate to consider the legislative setting. See *Davis* v. *Schnell*, 81 F. Supp. 872, 880–881 (S.D. Ala.), affirmed, 336 U.S. 933; *Lassiter* v. *Northampton Election Board*, 360 U.S. 45, 53; *United States* v. *Butler*, 297 U.S. 1.

662, that "[u]nder our Constitution the great privilege of the ballot may not be denied a man by the State because of his color." The patent discrimination of this Act further violates the constitutional "declaration" in the Fourteenth Amendment that "no distinction shall be made against [the colored race] by law because of their color" (*Strauder* v. *West Virginia*, 100 U.S. 303, 307).

CONCLUSION

As we have shown, the controversy in this case does not involve a non-racial dilution of the right to vote, but the total deprivation not merely of that right but of all rights to benefits of citizenship in a municipality, solely on account of race. If the allegations of the complaint are proved, we think it clear that Alabama Act 140 is patently unconstitutional under both the Fourteenth and Fifteenth Amendments,[12] and that the trial court has ample power to grant effective relief against the operation of *this* Act. Plainly, petitioners are entitled to an opportunity to go to trial and to prove their case.

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[12] If this case is remanded for trial, the state would, of course, have an opportunity to introduce evidence to overcome the prima facie unconstitutionality of the discriminatory operation of the statute. However, the state would have a heavy burden to justify the patent discrimination here involved. See *United States* v. *McElveen*, 180 F. Supp. 10, affirmed *sub nom. United States* v. *Thomas*, 362 U.S. 58; *Eubanks* v. *Louisiana*, 356 U.S. 584.

The judgment of the Court of Appeals should be reversed, and the cause remanded with instructions to proceed to trial.

Respectfully submitted.

J. LEE RANKIN,
Solicitor General.

HAROLD R. TYLER, JR.,
Assistant Attorney General.

PHILIP ELMAN,
DANIEL M. FRIEDMAN,
Assistants to the Solicitor General.

HAROLD H. GREENE,
D. ROBERT OWEN,
J. HAROLD FLANNERY, JR.,
Attorneys.

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NO. 32

IN THE

Supreme Court of The United States

October Term, 1960

C. G. GOMILLION, et al.,

Petitioners,

v.

PHIL M. LIGHTFOOT, As Mayor of The City of Tuskegee, et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENTS

THOMAS B. HILL, JR.,
Second Floor, Hill Building,
P. O. Box 116,
Montgomery, Alabama,

JAMES J. CARTER,
Second Floor, Hill Building,
P. O. Box 116,
Montgomery, Alabama,

HARRY D. RAYMON,
Tuskegee, Alabama,
Attorneys for Respondents.

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BRIEF FOR RESPONDENTS

OPINIONS BELOW

The opinion of the District Court (R. 24) is reported at 167 F. Supp. 405. The opinion of the Court of Appeals (R. 34) is reported at 270 F. 2d 594.

QUESTIONS PRESENTED

1. May a State, by and through its duly constituted Legislature, conforming to the State Constitution, fix and determine the territorial boundaries of a municipal corporation of that State?

2. May, or should, a Federal Court review the fixing and determination of the territorial boundaries of a municipality by a State Legislature, and annul and set aside the boundaries determined by the State Legis-

lature, and fix or substitute different or other boundary lines?

3. In the consideration of a State statute will the Federal Court make inquiry into the motive or motives of a legislator or legislators?

4. Should the Federal Courts pass upon a political question such as the determination of geographical boundaries of a political subdivision of a State?

5. Should the Federal Courts abstain from exercising jurisdiction or equity powers in cases posing political issues arising from a State's determination of the geographical boundaries of a City, one of its political subdivisions?

STATEMENT OF THE CASE

The Petitioner's complaint asks for a declaratory judgment that Act 140 of the 1957 Regular Session of the Legislature of Alabama, altering, redefining and rearranging the boundaries of the City of Tuskegee, Alabama, is invalid and in violation of the due process and equal protection clauses of the Fourteenth and Fifteenth Amendments to the Constitution of the United States. The complaint also asks injunctive relief to restrain the Mayor and Officers of Tuskegee, and the Probate Judge and other officials of Macon County, Alabama, from enforcing said Act, and requiring that Petitioners and others, who are negroes, and who prior to the enactment of Act 140 did, but since the said Act do not now, reside within the corporate limits of the City, "be recognized and treated in all respects as citizens of the City of Tuskegee" (R. 2-9).

In the District Court respondents moved to strike the complaint and certain exhibits thereto consisting of: a copy of a newspaper story, a copy of an article in *Time* magazine, and unrelated legislation and statements (R. 21). Respondents also moved the Court to dismiss the action for failure to state a claim, for lack of jurisdiction, and upon other grounds (R. 22).

The District Court held the fixing of municipal boundaries and limits to be a matter for the Legislature and not the Courts, and dismissed the action (R. 24-32). On appeal, the Court of Appeals affirmed. The majority opinion of the Court of Appeals essentially followed the reasoning of the district judge (R. 34); one judge dissented (R. 42); and one judge specially concurred, stating that in addition to the holding of the majority opinion he would apply "the doctrine of judicial abstention in political cases" (R. 65).

Petition for writ of certiorari was granted on March 21, 1960 (R. 74).

SUMMARY OF ARGUMENT

1. The Legislature of The State of Alabama altered, redefined and rearranged the boundaries of the City of Tuskegee, a political subdivision of the State. A City such as Tuskegee is a political subdivision of the State, and the State Legislature, within the limits of the State Constitution, may, in its absolute discretion, fix and determine the boundaries of the political subdivision, may extend or limit the boundaries, and may even abolish the municipality altogether. *Laramie County v. Albany County;* 92 U. S. 307; *Mount Pleasant v. Beckwith,* 100 U. S. 514; *Kelly v. Pittsburgh,* 104 U. S. 78;

Hunter v. Pittsburgh, 207 U. S. 161. The extension or reduction of city limits or boundaries is a purely political matter within the absolute power of the State Legislature. The fixing of territorial boundaries is a political function, and in matters of this kind the courts follow the action of the political department of the government which has made the determination. Cf. *Benson v. United States,* 146 U. S. 325. No one has a vested right to be included in or excluded from a local governmental unit.

2. The fact that Petitioners are negroes who, after the redetermination of Tuskegee's city limits, no longer live within the corporate limits of Tuskegee, gives to them no special right to have the new boundaries nullified on the ground of the alleged bad motives of the legislator who introduced the Act, or of the whole Legislature that adopted the Act. It is settled law that the Courts have nothing to do with the policy, wisdom, justice or fairness of such an Act. *Hunter v. Pittsburgh,* supra. Courts do not undertake a search for motive in testing constitutionality. *Doyle v. Continental Ins. Co.,* 94 U. S. 535. *Shuttlesworth v. Birmingham Board of Education,* 162 F. Supp. (N.D. Ala.) 372, 381, affirmed 358 U.S. 101.

3. The issue sought to be presented for adjudication by Petitioners is a political matter not meet for judicial determination, or is one as to which the courts should decline to exercise jurisdiction, see *Colegrove v. Green,* 328 U. S. 549; *South v. Peters,* 339 U. S. 276; or is beyond the scope of traditional limits of proceedings in equity. Cf. *Giles v. Harris,* 189 U. S. 475. Declaring the boundary act invalid would not solve Petitioners complaint, for the courts cannot re-map Tuskegee,

only the Legislature of Alabama can do that, and the Alabama Legislature could enact a new law or successive new boundary laws, with new litigation in the offing, each decision and each new law "progressively increasing the strain on federal-state relations." Judge Wisdom, R. 72.

Previous decisions, already referred to, applied to the allegations of the complaint, demonstrate the unsoundness of the complaint and that it was due to be dismissed by the District Judge. *Ex parte, Poreski,* 290 U. S. 30.

ARGUMENT

There is no need for a trial in the District Court on the merits. The existence of a substantial question of constitutionality of the State statute under attack must be determined by the allegations of the bill of complaint, and, if the question presented is plainly unsubstantial, "either because it is 'obviously without merit' or because 'its unsoundness so clearly results from the previous decisions of this Court as to foreclose the subject and leave no room for the inference that the question sought to be raised can be the subject of controversy' ", the District Judge clearly has the authority to dismiss the action. *Ex Parte Poreski,* 290 U. S. 30.

I

THE POWER OF A STATE TO DETERMINE TERRITORIAL BOUNDARIES OF ONE OF ITS MUNICIPAL CORPORATIONS.

We respectfully submit that the judgment of dismissal, affirmed by the Court of Appeals, was entirely proper, and is supported by an unbroken line of deci-

sions by this Honorable Court and other courts. There is no conflict of decisions, and no departure from settled law.

That a state legislature has the power to detach territory from municipalities or to extend, rearrange, or limit the boundaries thereof is universally recognized. This Court long ago, and continuously since, has recognized and announced the rule that counties, cities, and towns are municipal corporations, created by the authority of the Legislature, deriving "all their powers from the source of their creation, except where the Constitution of the State otherwise provides. . . ." And the State Legislature has authority to amend the Charter, enlarge or diminish its powers, "extend or limit its boundaries, divide the same into two or more, consolidate two or more into one . . . and even abolish the municipality altogether in the legislative discretion. Cooley on Const., 2d Ed. 192." *Laramie County v. Albany County*, 92 U. S. 307; *Mount Pleasant v. Beckwith*, 100 U. S. 514; Cooley's Constitutional Limitations, 8th Ed., Vol. I, Chapt. VIII, 393 et seq.

In *Kelly v. Pittsburgh*, 104 U. S. 78, a case of annexation of territory, involving argument under the Fourteenth Amendment, this Court said:

> "What portion of a State shall be within the limits of a City and governed by its authorities and its laws has always been considered to be a proper subject of legislation."

Then in *Hunter v. Pittsburgh*, 207 U. S. 161, the Court again had occasion to consider the power of a State acting through its duly elected and constituted Legislature, and within the limits of the State Consti-

tution, to "expand or contract the territorial area" of a municipality, without hindrance or interference by Federal Courts. In clear, forceful, emphatic language the Court "quickly disposed" of the issues by "the application of well-settled principles."

> "We have nothing to do with the policy, wisdom, justice, or fairness of the act under consideration; those questions are for the consideration of those to whom the State has entrusted its legislative power, and their determination of them is not subject to review or criticism by this court. We have nothing to do with the interpretation of the Constitution of the State and the conformity of the enactment of the Assembly to that Constitution; those questions are for the consideration of the courts of the State, and their decision of them is final." (P. 176.)

Then, after referring to numerous prior decisions, the Court continued, saying that the following principles have been established, "and have become settled doctrines of this Court, to be acted upon wherever they are applicable.

> "Municipal corporations are political subdivisions of the State, created as convenient agencies for exercising such of the governmental powers of the State as may be entrusted to them. For the purpose of executing these powers properly and efficiently they usually are given the power to acquire, hold, and manage personal and real property. The number, nature, and duration of the powers conferred upon these corporations and the territory over which they shall be exercised rests

in the absolute discretion of the State. Neither their charters, nor any law conferring governmental powers, or vesting in them property to be used for governmental purposes, or authorizing them to hold or manage such property, or exempting them from taxation upon it, constitutes a contract with the State within the meaning of the Federal Constitution. The State, therefore, at its pleasure, may modify or withdraw all such powers, may take without compensation such property, hold it itself, or vest it in other agencies, expand or contract the territorial area, unite the whole or a part of it with another municipality, repeal the charter and destroy the corporation. All this may be done, conditionally or unconditionally, with or without the consent of the citizens, or even against their protest. In all these respects the State is supreme, and its legislative body, conforming its action to the state Constitution, may do as it will, unrestrained by any provision of the Constitution of the United States. Although the inhabitants and property owners may, by such changes, suffer inconvenience, and their property may be lessened in value by the burden of increased taxation, or for any other reason, they have no right, by contract or otherwise, in the unaltered or continued existence of the corporation or its powers, and there is nothing in the Federal Constitution which protects them from these injurious consequences. The power is in the State, and those who legislate for the State are alone responsible for any unjust or oppressive exercise of it." (P. 178.)

Some of the later United States Supreme Court cases citing *Hunter v. Pittsburgh* with approval are: *Pawhuska v. Pawhuska Oil Co.*, 250 U. S. 394; *Trenton v. New Jersey*, 262 U. S. 182; and *Faitoute Co. v. Asbury Park*, 316 U. S. 502.

State Courts have also consistently followed the rule so clearly and decisively announced in *Hunter v. Pittsburgh*. In *City of Birmingham v. Norton*, 255 Ala. 262, 50 So. 2d 754, the Supreme Court of Alabama committed Alabama to the rule announced in *Hunter v. Pittsburgh*, quoting in extenso that portion of the opinion set out above. Louisiana has done likewise in *State v. City of Baton Rouge*, 40 So. 2d 477 (483). Also see *Madison Metropolitan Sewer District v. Committee*, 260 Wis. 229, 50 N.W. 2d 424; *State v. Wellston Sewer District*, (Mo. 1933) 58 S.W. 2d 988, 992, 993:

> "Relators also contend that they have certain inalienable rights more intangible in nature, such as the right to life, liberty, health and the privileges of citizenship, which have been denied them by repeal of the sewer law in violation of the several sections of the state and federal Constitutions cited in this opinion. . . .
>
> "Speaking to the same questions, as bearing on the alteration or dissolution of a municipal corporation, the Supreme Court of the United States said in *Hunter v. City of Pittsburgh*, 207 U. S. 161, 178, 179, 28 S. Ct. 40, 46, 52 L. Ed. 151, 159: 'Municipal corporations are political subdivisions of the state, created as convenient agencies for exercising such of the governmental pow-

> ers of the state as may be entrusted to them. . . . The state, therefore, at its pleasure . . . may expand or contract the territorial area. . . .'"

In Kentucky it has been held that, "The extension or reduction of the boundaries of a city or town is held, without exception, to be purely a political matter, entirely within the power of the Legislature of the state to regulate." *Lenox Land Co. v. City of Oakdale*, 125 S.W. 1089, opinion extended, 127 S.W. 538. And, "From whatever point it is viewed, the subject returns to this: The act of incorporating towns, and enlarging or restricting their boundaries, is legislative and political. In its exercise of discretion in such matters the Legislature has plenary power." *Carrithers v. City of Shelbyville*, 104 S.W. 744. See also *State v. Crimson*, 188 S.W. 2d 937.

McQuillin, Municipal Corporations (3rd Ed.) Sec. 4.05, Vol. 2, at page 18 says:

> ". . . the legislature, who may enlarge or diminish its territorial extent or its functions, may change or modify its internal arrangement, or destroy its very existence, with the mere breath of arbitrary discretion. Sic volo, sic jubeo, that is all the sovereign need say. . . ."

Black River Regulat. Dist. v. Adirondack League Club, 121 N.E. 2d 428, 433, (N.Y. Ct. of Appeals, 1954): "The concept of the supreme power of the Legislature over its creatures has been respected and followed in many decisions."

City of New York vs. Village of Lawrence, 165 N. E. 836: "The power to enlarge or restrict the bound-

aries of an established city is an incident of the legislative power to create and abolish municipal corporations and to define their boundaries."

The foregoing are only a few of the many cases which might be cited as supporting, following and reaffirming the rule enumerated in *Hunter v. Pittsburgh*. To cite or discuss them all would unnecessarily prolong this brief.

Furthermore, the attempt to link the state statute in question to complaints as to registration for voting lodged with or investigated by the Civil Rights Commission, fails to take note of the fact that Act 140 neither cancelled the registration of any voter, nor put any obstacle in the path of any qualified person desiring to register to vote. The right to register or to vote is not affected. Any voter who was formerly a resident within the boundaries of the City of Tuskegee can still vote, except that by reason of his present non-residence he may not vote in city elections, and his rights to vote or his obligation to pay taxes are no greater or no less than the right of any other citizen, white or negro, who lives in the County outside the boundaries of a municipality. As Judge Jones observed in the majority opinion below, when a person removes from a municipal corporation he loses his membership and the rights (obligations, duties, taxes, and other burdens) incident to such membership, "and this is no less true where the removal is involuntary and results from a change of boundaries than where the resident removes to another place. That this is so does not restrict the legislative power to alter municipal boundaries." (R. 39.) Petitioners are no longer inhibitants of the City of Tuskegee, and are no longer subject to its governmental pow-

ers and its burden of taxation, and they therefore have no valid basis for claiming a direct voice in the control of its affairs.

Petitioners in their brief[1] at last concede that, obviously, the confines and limits of Tuskegee or any other town, village or municipality in the State of Alabama may be determined by the Alabama Legislature. In Alabama, as in most states, we have laws under which municipalities and their inhabitants may, by following a prescribed procedure and popular vote, initiate the extending or reduction of corporate limits. Code of Alabama 1940, Title 37, Art. 1, §134, et seq., Art. 6, § 237, et seq. Here, however, as to Act 140, we are dealing with direct action of the State, not with some action of the municipality or its inhabitants; and the Legislature of Alabama has the unquestioned power to establish, alter, extend, or contract municipal boundaries. Alabama Constitution of 1901, Sec. 104 (18); *Ensley v. Simpson*, 166 Ala. 366, 52 So. 61; *State v. Gullatt*, 210 Ala. 452, 98 So. 373.

No one has a vested right to be either included in or excluded from a local governmental unit. Petitioners now accept this as settled principle.[2] The determination of a geographical boundary of a political subdivision of a State is purely political, "no appeal lying

1. Petitioners Brief, p. 10.

2. Petitioners Brief, p. 10. Petitioners brush aside *Hunter v. Pittsburgh*, 207 U. S. 161, and *Laramie County v. Albany County*, 92 U. S. 317, as creating a "contrary impression" by "broad language" (Brief p. 11), but these cases are clear and decisive. *Hunter v. Pittsburgh*, has been cited and followed as late as April 17, 1957, in *Port of Tacoma v. Parosa*, 324 P. 2d 438, 441; and October, 1958, in *People v. City of Palm Springs*, 331 P. 2d 4, where the court observed that no one "has a vested right to be either included or excluded from a local governmental unit." See also *Halstead v. Rozmiarek* (*Neb.* 1959), 94 N.W. 2d 37.

except to the ultimate tribunal of the public judgment, exercised either in the pressure of opinion or by means of the suffrage." Cf. *Yick Wo v. Hopkins*, 118 U. S. 356, 370. The confusion that would inevitably result from the vesting in, or assumption by, the Courts of the power and authority "to expand or contract the territorial area" of municipal corporations or other political subdivision, is obvious and tremendous. If the Courts have the power to supervise or control the legislative authority to expand or contract the territorial area of a political subdivision, a city or county, they have by the same token the power to create or destroy such a political subdivision. If the lower court has the power to say to the Legislature of Alabama, "You cannot reduce the corporate limits of Tuskegee", then by the same authority, the Court would have had the right and authority to say to the Legislature, upon petition of these same plaintiffs, if the corporate limits prior to the act complained of had not included or embraced them, "You must expand the corporate limits of Tuskegee to please these plaintiffs." Can anyone seriously contend that the Court is possessed of such authority? Could anyone seriously contend that the lower Court, or any other Court, could say to the Legislature of Alabama that either Act 232 of 1865-1866, which originally incorporated Tuskegee and fixed its boundaries 2½ miles square; or Act 40 of 1868, which reduced the town limits to one mile square; or Act 210 of 1869-1870, which expanded the boundaries; or Act 299 of 1872, which defined the boundaries; or Act 106 of 1898-1899, fixed for all times the boundaries of Tuskegee?

Hunter v. Pittsburgh and the other cited cases dem-

onstrate that constitutionality may turn upon and be decided by the State's absolute power of discretion in some fields, of which municipal boundaries is one.

For the Court below to have granted the relief prayed for by plaintiffs in the case at bar, it would have had to ignore precedents which have been established and repeatedly followed, affirmed, and reaffirmed.

II

LEGISLATIVE MOTIVE

From the inception of this litigation Petitioners have attempted to make much of the alleged motive or motives, which they label as intention or purpose, which prompted the passage of Act 140, going so far as to set out some of the personal and political background of the State legislator who introduced the Act in the State Legislature (R. 6), and adding as further background a newspaper article and the comment of a magazine of national circulation (R. 7). In the petition for a writ of certiorari they go even more afield citing *The New York Times* and the *Civil Rights Commission Report* (Petition p. 4, p. 14-15). These references can add nothing to their complaint.

The striking down of a state statute is a most serious matter under any circumstances, and particularly should be avoided in a situation where state authority in the field has previously, and consistently been upheld. *Hunter v. Pittsburgh*, 207 U. S. 161; *Mount Pleasant v. Beckwith*, 100 U. S. 514; *Laramie County v. Albany County*, 92 U. S. 307. And the claim of bad

motive cannot be utilized as a device to strike down a constitutional exercise of sovereign power by a State.[3]

It has long been the settled law of the land that the Courts "have nothing to do with the policy, wisdom, justice or fairness of the Act." *Hunter v. Pittsburgh*, supra. "If the State has the power to do an act, its intention or the reason by which it is influenced in doing it cannot be inquired into." *Doyle v. Continental Ins. Co.*, 94 U. S. 535, 541. "We cannot undertake a search for motive in testing constitutionality." *Daniel v. Family Security L. Ins. Co.*, 336 U. S. 220, 224. Also see, *Calder v. People of Michigan*, 218 U. S. 591; *Tenny vs. Brandhove*, 341 U. S. 367; *Arizona v. California*, 283 U. S. 423, 455.

The question concerning legislative motive and intention was considered and laid to rest by Judge Rives in the recent case of *Shuttlesworth v. Birmingham Board of Education*, 162 F. Supp (N.D. Ala.) 372, 381; affirmed 358 U. S. 101:

> "In testing constitutionality 'we cannot undertake a search for motive'. 'If the state has the power to do an act, its intention or the reason by which it is influenced in doing it cannot be inquired into.' *Doyle v. Continental Insurance Co.*, 94 U. S. 535, 541, 24 L. Ed. 148. As there is no one corporate mind of the legislature, there is in reality no single motive. Motives vary from one individual member of the legislature to another.

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3. "In theory escape would always be possible if courts were free to scrutinize the motives of legislators . . . but of all conceivable issues this would be the most completely 'political' and no court would undertake it." *The Bill of Rights*, Learned Hand, (Harvard University Press 1958), p. 46, as quoted in *Amer Competition*, Law School of Harvard University, 1960, Brief For The Respondents, *Gomillion v. Lightfoot*.

> Each member is required to 'be bound by Oath or Affirmation to support this Constitution.' Constitution of the United States, Article VI, Clause 3. Courts must presume that legislators respect and abide by their oaths of office and that their motives are in support of the Constitution."

Courts have consistently applied this doctrine in cases involving civil rights as well as property rights.

III

SHOULD THE FEDERAL COURTS PASS ON A POLITICAL QUESTION? JUDICIAL ABSTENTION OR SELF-LIMITATION IN POLITICAL CASES.

This case is a direct attack upon action of the State of Alabama in exercising its power concerning one of its political subdivisions.

The concurring opinion of Judge Wisdom (R. 65, 71) suggests that the Court should not put a "new kind of strain on federal-state relations already severely strained. Control over the political subdivisions of a state including the incorporation of cities and towns and the determination of their boundaries, is a political function of the state legislature and an attribute of state sovereignty in a federal union. So it has always been held. Let the chips fall where they may, the courts have decided. This is the substance of the holdings in *Laramie County v. Albany County*, 1876, 92 U. S. 307; *Town of Mount Pleasant v. Beckwith*, 1879, 100 U. S. 514; and *Hunter v. Pittsburgh*, 1907, 207 U. S. 161. In these and similar cases the citizens who suffered from changes in city limits, by loss of property

values or by increased taxation (if the boundaries are extended) or from lack of fire and police protection (if the boundaries are contracted) and from loss of voting privileges (in the case of a gerrymander), were in the same situation as the plaintiffs are in this case."

Cases such as *Colegrove v. Green*, 328 U. S. 549; *South v. Peters*, 339 U. S. 276; and *The Cherokee Nation v. State of Georgia*, 30 U. S. (5 Pet.) 1; are illustrative of the types of political questions and decisions with which the courts will not interfere. A non-justiciable political question is one which is under our system of government, and separation of powers, committed either to the executive or legislature for final determination.[4] Geographical boundaries pose such questions. Indeed in cases *involving the very life* and *liberty* of citizens it has been held that the geographical limits of a military reservation is beyond the power or competence of the courts; the courts being bound "to follow the political department of the government". *Benson v. United States*, 146 U. S. 325, 331; *United States v. Holt*, 168 Fed. 141, affirmed 218 U. S. 245. Indeed, the alleged deprivations here are less grave than in *Colegrove*, and much less grave than in *Benson* where a man was on trial for his very life.

Judge Wisdom says Petitioners propose a cure worse than the disease (R. 65). *Colegrove v. Green*, 328 U. S. 549, 566. Actually, if *Hunter v. Pittsburgh* and similar cases should be shunted aside, Petitioners claim would not be one for judgment in their favor, see *Giles v. Harris*, 189 U. S. 475, and the relief they seek would

4. See Field, *Doctrine of Political Questions in Federal Courts*, 8 Minn. Law Review, 485; Cf. Finklestein, *Judicial Self-Limitation*, 37 Harvard Law Review, 338, 39 Harvard Law Review 221.

not be a solution of their claims, but would create an area of "friction" between federal and state relations. Cf. *Williams v. Dalton*, (6 Cir.) 231 F. 2d 646.

If Act 140 should be nullified, what then would be the boundaries of Tuskegee? Can any court effectively re-map Tuskegee? An infinite number of different boundaries for Tuskegee may be devised by the Legislature of Alabama. At what point could it be said that the fixing of the boundary was within the proper sphere of the Legislature's powers and free from tainted motives. No one could, or would, suggest the application of judicial guesswork in this field. Petitioners recognize that the decision in this case can afford no settlement of the political boundary line problem. They observe, "Needless to say, the state may give Tuskegee new limits by enacting another statute. This may necessitate litigation testing the validity of that legislation." (Brief p. 17.) They recognize the power of the State to determine the geographical boundaries of Tuskegee[5]; that there is no right to be included in or excluded from the city limits of a political subdivision of the State[6]; and that other, and different boundaries may be determined at any time by the Legislature.[7] These admitted matters constitute the very elements which call for the courts to recognize this a case posing a political question, one beyond the traditional limits of proceedings in equity, and one from which the courts should abstain from interfering.

5. Brief, p. 10.
6. Brief, p. 10.
7. Brief, p. 17.

CONCLUSION

It is respectfully submitted that the dismissal of the action by the District Court was proper; and that the judgment of the Court of Appeals is right and is due to be affirmed.

Respectfully submitted,

THOMAS B. HILL, JR.,
Second Floor, Hill Building,
P. O. Box 116,
Montgomery, Alabama,

JAMES J. CARTER,
Second Floor, Hill Building,
P. O. Box 116,
Montgomery, Alabama,

HARRY D. RAYMON,
Tuskegee, Alabama,
Attorneys for Respondents.

10,

Supreme Court of the United States

October Term, 1960

No. 32

C. M. GOMILLION, *et al.*,

Petitioners,

vs.

PHIL M. LIGHTFOOT, as Mayor of the City of Tuskegee, *et al.*,

Respondents.

MOTION FOR LEAVE TO FILE BRIEF FOR THE AMERICAN CIVIL LIBERTIES UNION AS *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE*

LAWRENCE SPEISER,
1612 Eye Street, N. W.,
Washington 6, D. C.

CURTIS F. McCLANE,
5 Maiden Lane,
New York, N. Y.

Attorneys for American Civil Liberties Union.

ROWLAND WATTS,
of Counsel.

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IN THE

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Respondents.

MOTION FOR LEAVE TO FILE BRIEF FOR THE AMERICAN CIVIL LIBERTIES UNION AS *AMICUS CURIAE*

The American Civil Liberties Union, hereinafter called the "Union" respectfully moves for leave to file a brief *amicus curiae* in this case. The attorneys for petitioner have consented to the filing, but the attorneys for respondent have refused. Both the consent and the refusal have been filed with the Clerk of the Court.

The Union is a national non-political organization devoted solely to defending the civil liberties guaranteed by federal and state constitutions.

The Union is interested in the instant case because it believes that the State of Alabama has redesigned the boundaries of the City of Tuskegee to exclude Negroes from the City. By this discriminatory redistricting, the state infringed the constitutional rights of petitioners who are

of Negro origin and residents of the City of Tuskegee as designed prior to the enactment of this law.

The rights infringed include the 15th Amendment's guarantee that no State shall deprive a citizen of the right to vote on account of color, and the 14th Amendment's guarantees that no State shall deprive a person of property without due process of law, and that no State shall deny a person equal protection of the laws.

Although various aspects of these issues have been raised by petitioner in the lower courts and in the petition for a writ of certiorari, the Union believes that its discussion of them and of the jurisdictional question will be helpful to the Court.

The Union respectfully moves that it be granted leave to file the accompanying brief.

LAWRENCE SPEISER,
1612 Eye Street, N. W.,
Washington 6, D. C.

CURTIS F. MCCLANE,
5 Maiden Lane,
New York, N. Y.

Attorneys for American Civil Liberties Union.

ROWLAND WATTS,
of Counsel.

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C. M. GOMILLION, *et al.*,

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Respondents.

BRIEF FOR THE AMERICAN CIVIL LIBERTIES UNION AS *AMICUS CURIAE*

Interest of *Amicus*

The interest of *amicus* is set forth in the preceding motion for leave to file.

Statement of the Case

This is a class action instituted by twelve Negroes against officials of Tuskegee and Macon County, Alabama. The complaint questions the validity of an act of the 1957 Session of the Alabama Legislature rearranging the boundaries of the City of Tuskegee, Alabama so as to remove therefrom all but four qualified Negro voters, but no qualified white voter. Petitioners allege that the purpose and effect of the statute was to deny them the right to vote in city elections and to deprive them of the rights of municipal

citizenship, such as police protection, street improvements, and participation in city affairs. The prayer was for injunctions against the enforcement of the Act as to petitioners and their class.

The United States District Court for the Middle District of Alabama sustained defendants' motion to dismiss the complaint for failure to state a claim upon which relief could be granted and for lack of jurisdiction (167 F. Supp. 405). The Court of Appeals for the Fifth Circuit affirmed with one judge dissenting (270 F. 2d 294). The decision of the Court of Appeals was based upon two propositions, to wit:

> (1) In accordance with the "political question" and "equitable self-restraint" doctrines of jurisdictional limitation expounded in the cases of *Colegrove* v. *Green*, 328 U. S. 549 (1946), and *South* v. *Peters*, 339 U. S. 276 (1950), the complaint does not present a question which can be or should be judicially determined.
>
> (2) A municipality, being but a creature of the State, is subject to the arbitrary and plenary power of the Legislature, hence "the power of increase and diminution of municipal territory is plenary, inherent and discretionary in the Legislature, and, when duly exercised, cannot be revised by the courts". While such legislation must conform to the State Constitution, it is unrestrained by the Federal.

Under the view which it took of the case, the Court of Appeals was not required to decide whether any rights of petitioners protected by the Federal Constitution had been violated.

Issues Presented

A. Whether the jurisdiction of the Court to hear and determine this case is limited by the "political question" or "equitable self-restraint" doctrines?

B. Whether the power of a State to alter the boundaries of its municipal corporations renders such an act invulnerable to attack on grounds that it violates the Federal Constitution when the attack is made by "third persons" and when the purpose and effect of such act was to deprive such third persons of rights secured them by the Federal Constitution?

C. Whether the statute in question violates or abridges any right of petitioners which is protected by the Federal Constitution?

Summary of Argument

The Federal Judiciary has jurisdiction to hear and adjudicate the complaint below. The Federal judiciary power is neither barred by the Constitutional doctrine of separation of powers nor by the judicial self limitation known as equitable self-restraint.

The act challenged in this complaint, while based on the state constitutional power to define municipal boundaries, violates the Federal Constitution through the arbitrary misuse of that power in a calculated and successful effort to deprive individual persons (not a municipality) of rights secured them by the 14th and 15th Amendments. The complaint states a federal case involving gross racial discrimination which the petitioners are entitled to try and sustain.

ARGUMENT

I. This Court has jurisdiction to hear and determine this case as being one which arises under the Constitution and Laws of the United States, and jurisdiction is not here limited by the "political question" or "equitable self-restraint" doctrines.

Under Article Three of the Federal Constitution, the judicial power of the United States extends to all cases arising under its Constitution and laws. *Federal Inter-*

mediate Credit Bank v. *Mitchell* 277 U. S. 213 (1928). This Court has often had occasion to determine when and under what conditions an action could be said to involve a "Federal question". As a consequence certain guide posts have been established. The ultimate validity of the merits of a case is wholly extraneous to the determination of the existence of a Federal question. *Southern Pacific Railway Co.* v. *California*, 118 U. S. 109 (1886); *Bell* v. *Hood*, 327 U. S. 678 (1946). This Court has said that a case arises under the Constitution or laws of the United States whenever its correct decision depends on the construction of either. *Cohens* v. *Virginia*, 19 U. S. 264 (1821). It follows that allegations sufficient to show deprivation of rights secured petitioners under the Federal Constitution by State action presents a question arising under the Constitution and laws of the United States. Here the complaint alleges that the statute in question deprives petitioners of the right to vote on account of race in violation of the Fifteenth Amendment and denies them equal protection of the laws and of property without due process of the law in violation of the Fourteenth Amendment. Clearly the complaint presents a "Federal question" within the Court's jurisdiction unless limited by the "political question" or "equitable self-restraint" doctrines.

A clear line of demarcation should be drawn between these two oft-confused concepts of judicial limitation. The "political question" limitation is based upon the separation of powers doctrine; the "equitable self-restraint" limitation is self-imposed and has been employed by the Court to refuse equitable relief in some *political rights* cases. In the former the Court lacks jurisdiction; in the latter having jurisdiction, it merely refuses its exercise. It is therefore important to note the distinction between a political question and a political right. A political question is a question whose determination lies within the prerogative of another branch of government, and hence

is outside the jurisdiction of the court. A political right on the other hand is a personal and private right as distinguished from a property right, i.e., the right to vote, the presence of an issue of political rights, will not render a case non-justiciable, but may cause a court to refuse to exercise its equitable jurisdiction, as in *South* v. *Peters, supra.*

In view of the line of authority from *Nixon* v. *Herndon*, 273 U. S. 536 (1932); through *Terry* v. *Adams*, 345 U. S. 461 (1953), it cannot be seriously contended that the issue of the right to vote poses a non-justiciable political question. Nor can the cases of *Colegrove* v. *Green*, 328 U. S. 549 (1946); *MacDougall* v. *Green*, 335 U. S. 281 (1948); *South* v. *Peters, supra* or *Turman* v. *Duckworth*, 329 U. S. 675 (1946), be considered authority for the proposition that this case presents a non-justiciable issue. The *Colegrove* case cannot be taken as holding that the question presented was non-justiciable inasmuch as the majority of the members deciding that case thought that *Smiley* v. *Holm*, 285 U. S. 355 (1932), had determined that such issues were justiciable. Mr. Justice Rutledge agreed with the dissent that the court had jurisdiction, but thought that the injunction was rightly denied as a matter of equitable discretion.

The majority holding of this case was summarized by Mr. Justice Rutledge in *Turman* v. *Duckworth, supra*, at page 678 as follows:

> "A majority of the justices participating refused to find there was a want of jurisdiction, but at the same time a majority, differently composed, concluded that the relief sought should be denied."

That the court did not accept the doctrine of nonjusticiability seemingly expressed by Mr. Justice Frankfurter in the *Colegrove* case seems to be borne out by the later case of *MacDougall* v. *Green, supra.* The unanimous assump-

tion of jurisdiction by an otherwise divided court in that case can be taken as a holding that political rights cases, as distinguished from cases involving political questions, are clearly justiciable. The court then does not *lack* jurisdiction to hear and determine this case, neither should it refuse its exercise under the doctrine of "Equitable Self-Restraint". Suits at law for damages arising out of the federally protected right of suffrage have been entertained consistently in the Federal Courts. *Wiley* v. *Sinkler*, 179 U. S. 58 (1900); *Nixon* v. *Herndon, supra; Nixon* v. *Condon*, 286 U. S. 73 (1932). But injunctive (equitable) relief, which by flexible decrees assures parties of the greatest approximation of their normal rights, has been hedged about by a traditional reluctance to grant equitable relief in cases involving political rights.

The traditional reluctance of Federal Courts to exercise their equitable powers in voting cases seems to stem from the case of *Giles* v. *Harris*, 189 U. S. 475 (1903): In the *Giles* case Mr. Justice Holmes found many practical obstacles to the use of equitable judicial power, none of which are present in the case at bar. Nevertheless, the opinion stated:

> *"We are not prepared to say that the decree should be affirmed on the ground that the subject matter is wholly beyond the jurisdiction of the Circuit Court* • • •.
>
> "It will be observed, in the first place, that the language of (Title 42 USC 1983) does not extend the sphere of equitable jurisdiction in respect of what shall be held an appropriate subject-matter for that kind of relief. The words are, 'shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.' They allow a suit in equity only when that is the proper proceeding for redress, and they refer to existing standards to determine what is a proper proceeding. *The traditional limits of proceedings in equity have not embraced a remedy for political wrongs.*" (Emphasis supplied.)

Since the means of enforcing the substantive rights granted by Title 42 USC, Section 1983 is provided in Title 28 USC, Section 1343 (*Glicker* v. *Michigan Liq. Contr. Comm.*, 160 Fed. 2d 96 (C.A. 6, 1947)) the deficiency pointed out by Mr. Justice Holmes is now remedied by legislation specifically relating equity jurisdiction to voting rights cases. In Section 121 of the Civil Rights Act of 1957, Title 28 USC § 1343(4) Congress has unequivocally provided for equitable jurisdiction in cases involving the right to vote. It is significant that Part III of the Act is entitled "To STRENGTHEN THE CIVIL RIGHTS STATUTES * * *" and that the amendment supplements pre-existing procedural legislation by adding, "To recover damages or to *secure equitable* or other relief under any Act of Congress providing for the protection of Civil Rights, *including the right to vote.*" (Emphasis added.) Obviously Congress intended by the addition of this subparagraph that the Federal Courts should not refuse to exercise equitable jurisdiction in cases, such as this, involving the right to vote. If the phrase, "including the right to vote," is to have any meaning it must be that the traditional hesitance of the judiciary to grant equity in political rights cases must yield to the will of Congress, and that the right to vote be enforceable by the full powers of the judiciary.

Neither the separation of powers nor equitable self-restraint doctrines bars the Federal Court from declaring unconstitutional a statute which deprives citizens of rights secured by the Constitution simply because the statutes purports to exercise the legislature's power to define municipal boundaries.

The court below reasoned that inasmuch as the creation of municipalities and the delineation of their boundaries are the exclusive prerogative of the legislative branch of Government, then the judiciary lacks jurisdiction to rule upon the validity of the Act here in question. A necessary premise to this conclusion is that the voiding of

the statute is tantamount to the judicial creation of a municipal boundary. In support of its conclusion the court stated that the power to prescribe municipal boundaries is exclusively in the Legislature and "*when duly exercised*, cannot be *revised* by the courts" (emphasis supplied). The court failed to recognize, however, that a court may invalidate such a statute when the legislative power was *not duly exercised* on grounds other than those related to the propriety of the boundary determination itself, and that such a ruling does not involve legislative or "political" action.

The Alabama Legislature did not here prescribe a municipal boundary which incidentally inconvenienced petitioners by taking from them certain voting and property rights, rather it deprived petitioners of certain voting and property rights and incidentally changed the city's boundaries to accomplish this purpose. The distinction is both real and important. True, the legislature, not the courts, must define the boundaries of a municipality, but while this prevents a court from substituting its judgment for that of the legislature in passing upon the wisdom of the boundary chosen, it does not prevent the court from determining whether the act is invalid for other reasons.

The decision of the court below, if carried to its ultimate conclusion, negates the power of the judiciary to declare any act of the legislature unconstitutional, for just as the power to draw municipal boundaries is a legislative function, so also is the power to enact laws. If the invalidation of a statute which determines a corporate boundary is necessarily the exercise of a legislative function by the court, then the invalidation of any statute is tantamount to an exercise of a legislative function by a court. But, just as the judiciary does not pass a law when it declares a statute unconstitutional, neither does it create a boundary when it declares one unconstitutional. It is not within the power of a court to create a municipal corporation or to

fix its boundaries, or to ascertain pertinent subjects for legislation, or to levy taxes, or to regulate public utilities or to define a crime or to enact laws, but this does not prevent the courts from declaring any of the above acts of the legislature unconstitutional. A court cannot levy a tax or question the wisdom of the legislature in so doing, but a court can determine that a tax levying statute violates the Fourteenth Amendment in that it takes property without due process or that it denies equal protection of the laws. Likewise a court cannot create a municipality, or prescribe its boundaries but a court can decide that such a statute violates the Fourteenth or Fifteenth Amendments in that it deprives petitioners of property without due process, that it denies them of equal protection, or that it deprives them of their right to vote on account of race. It is remarkable and incomprehensible that the majority below seemed to rely on the case of *Ex Rel. Fred H. Davis, et al.* v. *City of Stuart*, 120 So. 335; 64 A.L.R. 1307, 1321, 1322, 1323, 1324 (1929). A study of this case shows that its reasoning and language squarely supports the petitioners:

> "It is believed that the above quotations give a fair compendium of the reasoning underlying the numerous cases supporting the majority view that the legislative power in this regard is absolute and unlimited, and not subject to judicial review. They come from such high sources as to compel respectful consideration. But, as forcible, persuasive, and even brilliant as some of these arguments in behalf of the majority view are, their thoughtful perusal, and especially the conclusion arrived at, leaves something to be desired. One cannot suppress the thought that, if this view be accepted without qualification and followed to its logical conclusion, what may the Legislature not do * * *?
>
> "And if this doctrine be fully adopted, what becomes of those sacred and basic rights of person and property, which have their roots deep in the past and

which the people of America have sought to safeguard in the Bills of Rights * * *

"This theory of unlimited power in the passage of statutes establishing or extending municipal boundaries, if correct, would make it an exception to the general rule, and that, too, without giving any sufficient reason for such exception. The general rule is that the Legislature is supreme in the legislative field, which is the most powerful branch of government, *so long as it does not violate any of the provisions of the organic law*. There is to our minds no justifiable exception of any class of legislation from this all-pervasive and fundamental principle * * *

"It thus appears to us that the contention that the power of the Legislature in this particular respect is unlimited and beyond judicial review, unless there is some specific provision of the Constitution expressly regulating or restraining the action of the Legislature in the exercise of the particular power, is unsound. Regardless of the absence of such a specific provision, while great latitude must be allowed the Legislature in such matters, yet, if the Boundary Extension Act constitutes a palpably arbitrary, unnecessary, and flagrant invasion of personal and property rights clearly guaranteed by other provisions of the Constitution, such action is as much subject to judicial review as any other class of legislation. It may be true that only the Legislature can 'draw the line,' but, if the line as drawn be unconstitutional, the courts can set it aside, leaving it to the Legislature to draw another and valid line if it so wills."

II. The power which a state may exercise over its municipalities is limited by the constitutional rights of third persons, hence an Act of the State of Alabama which has the effect of depriving petitioners of rights protected by the Federal Constitution is invalid even though the Act purports to be a manifestation of the State's recognized power to alter the boundaries of one of its municipal corporations.

The rule is universally recognized that the legislature, in the absence of specific limitations imposed by its State Constitution, has power to detach territory from its municipalities. The cases supporting this proposition are voluminous. It is likewise universally recognized that a municipal corporation with respect to its "governmental" functions, has no "rights" which are protected by the Federal Constitution—that a municipal corporation is not a "person" within the protection of the Fourteenth and Fifteenth Amendments of the Constitution of the United States.

The Court of Appeals, reasoning from the above stated principles, reached the erroneous conclusion that the Federal Constitution imposes no limitation upon the right of the Legislature of Alabama to rearrange the municipal boundaries of Tuskegee under the circumstances alleged in the complaint. To say that the *municipality* has no rights which are protected by the Federal Constitution is not to say that the Federal Constitution imposes no limits on the power of the legislature to act in such matters. The court below failed to distinguish between cases involving the rights of third persons on the one hand and the rights of municipalities on the other.

An Act of the legislature dealing with a municipality, while not assailable on the ground that it abridges a constitutional right of the municipality may nevertheless be invalid if it arbitrarily abridges a constitutional right of some third person.

That the Court of Appeals was applying a correct principle of law in an incorrect manner becomes apparent when the cases cited by it as containing "governing principles" are analyzed. In those cases (*Hunter* v. *City of Pittsburgh*, 207 U. S. 161 (1907); *City of Pawhuska* v. *Pawhuska Oil & Gas Co.*, 250 U. S. 394 (1919), and *City of Trenton* v. *State of New Jersey*, 262 U. S. 182 (1923)) redress was sought for the abridgement of a supposed constitutional right of the municipality. These cases merely recognize the fact that a municipality is not a person and hence has no rights which are protected by the Federal Constitution; that the relationship between a city and its state is governed by state law and hence does not present a "Federal question" and that property owned by a city in its governmental capacity is not protected against state taking by the Federal Constitution.

Petitioner here, however, are not complaining of an injury done to the City of Tuskegee, but rather of one done themselves. They are not asserting that the Act in question deprives Tuskegee of property without due process of law, nor that it denies equal protection to Tuskegee, nor that Tuskegee's right to vote has been abridged, rather they are asserting that under the guise of prescribing municipal boundaries, the State of Alabama has purposefully and systematically deprived them of property and of the right to vote by an Act which was purely arbitrary, unreasonable and wholly unrelated to any legitimate municipal purpose, and that hence their rights under the Fourteenth and Fifteenth Amendments have been abridged.

The limits imposed upon the Legislature in dealing with its municipalities are basically the same as those imposed on any so-called "exclusively legislative" function. Particularly in the regulation of matters which affect public health and safety does the Legislature have broad—almost sacred—powers; yet even in this field these same limitations are always present. The nature and definition of

these limitations on legislative power may be abstracted from the following statements:

> "No court, state or federal, has held that a state legislature has unlimited power or authority even with respect to such subjects as the health and welfare of the people of the state. The primary responsibility rests with the state legislature, but courts have a solemn and inescapable duty, in an appropriate case, of deciding whether state action is so *arbitrary and unreasonable as to be unconstitutional.*" *England* v. *Louisiana State Board of Medical Exam.*, 263 F. 2d 661, 663 (C. A. 5, 1959). (Emphasis supplied.)
>
> The law must have some "real or substantial relation" to the subject matter which has supposedly caused the legislative power to be evoked. *Jacobson* v. *Mass.*, 197 U. S. 11, 31 (1905).
>
> The statute may not be "so unreasonable and extravagant as to interfere with property and personal rights of citizens *unnecessarily and arbitrarily*" (emphasis added). *Watson* v. *Maryland*, 218 U. S. 173, 178 (1910).
>
> Acts are invalid which "have no rational relation" to the objective for which the legislative power has been seemingly evoked. *Williamson* v. *Lee Optical Company*, 348 U. S. 483, 491 (1955).

By analogy, a statute detaching territory from a municipality is unconstitutional when it deprives former residents of property without due process or denies them equal protection of the laws or abridges their right to vote *and when* the statute is purely arbitrary, unreasonable and in no way rationally related to any valid municipal or public purpose or good. It is the combination of an injury on the one hand with arbitrariness and lack of municipal or public necessity or convenience on the other that condemns the statute. The statute here in question was not only "arbitrary" it was a calculated deprivation of the peti-

tioners' rights secured by the Constitution. Its only purpose was to deprive petitioners of their right to vote.

The court below held, however, that if the arbitrariness, unreasonableness, lack of proper purpose or lack of rational relation to the ostensible objective does not appear on the face of the statute, courts are helpless. Such a rule would quickly nullify the Constitution. If all a Legislature needs do to enact otherwise unconstitutional statutes is to conform them to the letter of the law, then the judiciary's function as a check on the legislative is ended. The lower court's ruling—that form governs substance—that the letter rather than the spirit of the law is controlling—is contrary to the overwhelming weight of authority. The correct rule is succinctly expressed in the case of *Fairbank* v. *United States*, 181 U. S. 283, 294, 300 (1901), as follows:

> "[W]hat cannot be done directly because of constitutional restriction cannot be accomplished indirectly by legislation which accomplishes the same result. * * * Constitutional provisions, whether operating by way of grant or limitation, are to be enforced according to their letter and spirit, and cannot be evaded by any legislation which, though not in terms trespassing on the letter, yet in substance and effect destroy the grant or limitation."

A State legislature cannot abridge the constitutional rights of a citizen through the guise of exercising its power over municipalities. Typical of cases recognizing this principle are those which hold that the constitutional protection against impairment of contract obligations invalidated legislation dealing with municipalities when this constitutional protection is breached thereby. Likewise the Constitutional protection against discrimination and denial of due process will invalidate legislation contracting municipal boundaries when the rights of third persons secured thereby are arbitrarily abridged.

The Court of Appeals attempted to distinguish the impairment of obligation of contract cases from the present situation by stating that the petitioners have no contractual rights which are violated by the act in question. This is beside the point. The obligation of contract cases stand for the proposition that the so-called plenary power of the legislature to deal with its municipalities is limited by the constitutional rights of third persons. This is no less true of the protections guaranteed by the Fourteenth and Fifteenth Amendments than of the protections guaranteed by Article I, Section Ten, of the Federal Constitution.

The rule expounded by Mr. Justice Field in the case of *United States* v. *Mayor, etc. of New Orleans*, 103 U. S. 358, 365 (1881), seems controlling on this issue:

> "The argument in support of the Act is substantially this: that the taxing power belongs exclusively to the Legislative Department of the Government, and when delegated to a municipal corporation may, equally with other powers of the corporation, be revoked or restricted at the pleasure of the Legislature.
> "It is true that the power of taxation belongs exclusively to the Legislative Department, and that the Legislature may at any time restrict or revoke at its pleasure any of the powers of a municipal corporation, including, among others, that of taxation, *subject, however, to this qualification, which attends all state legislation, that its action in that respect shall not conflict with the prohibitions of the Constitution of the United States and, among other things, shall not operate directly upon contracts* * * * so as to impair their obligations * * *." (Emphasis added.)

If but slightly altered, the above statement would serve as the opinion in this case:

> The argument in support of the Act is substantially this: that the power to prescribe municipal boundaries belongs exclusively to the Legislative Department of the Government, and municipal boundaries

may be increased, decreased, altered or wholly abolished at the pleasure of the Legislature. It is true that the power to prescribe municipal boundaries belongs exclusively to the Legislative Department, and that the Legislature may at any time decrease or alter at its pleasure the boundaries of a municipal corporation, subject, however, to this qualification, which attends all state legislation, that its action in that respect shall not conflict with the prohibitions of the Constitution of the United States and, among other things, shall not operate so as to deprive citizens of property, equal protection of the laws or of the right to vote in contravention of the Fourteenth or Fifteenth Amendments.

III. The Act of the Alabama legislature in question denies and abridges the constitutionally protected rights of the petitioners.

A. In contravention of the Fifteenth Amendment, the Act denies the petitioners the right to vote solely because of their race.

This legislative enactment is but one more of the numerous attempts of the constituted authorities of some states to disfranchise Negroes and destroy their constitutionally protected right to vote. This Court has been repeatedly faced with the schemes and devices utilized by such states, but it has always been quick to recognize the motivating purpose underlying such enactments, and it has jealously applied the proscription of the Fifteenth Amendment of the United States Constitution.

Counsel agrees with the District Court that legislative wisdom is not a subject for judicial inquiry; however, its manifestation as reflected in the effect and operation of a statute is properly within the scope of review:

> "And the rule is general, with reference to the enactments of all legislative bodies, that the courts cannot inquire into the motives of legislators in

> passing them, except as they may be disclosed on the face of the Act, or inferable from their operation, considered with reference to the condition of the country and existing legislation. The motives of the legislators, considered as the purpose they had in view, will always be presumed to accomplish that which follows as the natural and reasonable effect of their enactments." *Soon Hing* v. *Crowley*, 113 U. S. 703, 710 (1885).

Where, then, as here no legislative intent or purpose is clearly discernible on the face of the statute, the Court must look to the effect of its operations. Speaking for the Court in 1890, Justice Harlan put it this way:

> "There may be no purpose upon the part of a Legislature to violate the provisions of that instrument (the Constitution), and yet a statute enacted by it, under the form of law, may, by its necessary operation, be destructive of rights granted or secured by the Constitution. In such cases, the courts must sustain the supreme law of the land by declaring the Statute unconstitutional and void. This principle of constitutional interpretation has been often announced by this court." *Minnesota* v. *Barber*, 136 U. S. 313, 319 (1890).

Counsel contend that, unlike the *Barber* case, not only is the operation of the statute unconstitutional, but the legislative purpose clearly ascribable to it violates the provisions of that instrument.

When the Act is viewed "in the light of its history and of its present setting, it is seen to be a deliberate and calculated device * * *" (*Grosjean* v. *American Press Co.*, 297 U. S. 233, 250 (1936). As soon as it became apparent that discrimination at the polls based on race would not be permitted, some states sought to achieve that end by indirection. The originators of the "Grandfather clause" argued to this Court that it should not ascribe an occult motive to the legislature and that inequalities arising from the operation of the statute were the natural consequences of inherent circumstances. *Guinn* v. *United States*, 238

U. S. 347, 359 (1915). But the Court saw beyond the apparently innocent statute to its purpose. The next calculated device was an attempt to disguise state action with the cloak of private organization, but even the most extreme disguise disintegrated upon judicial inquiry. *Nixon* v. *Herndon*, 286 U. S. 73 (1932); *Smith* v. *Allwright*, 321 U. S. 649 (1944); and *Terry* v. *Adams*, 345 U. S. 461 (1953). Failing with the subterfuge of private action, next came enactments designed to vest in individual voting officials the authority to arbitrarily discriminate but again the courts affirmatively enforced the dictates of the Constitution. *Baskin* v. *Brown*, 174 F. 2d 391 (C. A. 4, 1949); and *Davis* v. *Schnell*, 81 F. Supp. 872 (S. D. Ala., 1949). The case at bar presents one more statute in the same pattern, enacted for the same purpose, and intended to achieve the same effect.

The Act of the Alabama legislature, if viewed in a vacuum, appears innocent on its face. It is contended on behalf of its validity that it is merely a change in a municipal boundary, the sort which legislatures are always making for various reasons. But law does not operate in a vacuum and the petition filed below sets forth allegations of fact which will render the statute invalid and reveal it as an "ingeniously or ingenuously" contrived scheme to discriminate against the petitioners solely because of their race. The facts cast the framework within which this statute must be considered; the fact that the Civil Rights Commission reports that it received more complaints of voting discrimination from Macon County, Alabama, the county in which Tuskegee is located, than from any other county in the country (Report of the United States Commission on Civil Rights, 1959, p. 56); the fact that proceedings have been instituted arising from the vast pattern of discrimination in Macon County and the District Court for the Middle District of Alabama will determine the matter on its merits after remand by this Court (*United States* v. *Alabama*, — U. S. —, 4 L. ed. 2d 982 (1960)); the

fact that all persons who will be outside of the boundary of Tuskegee as a result of this statute are Negroes; the fact that what was a four-sided boundary is now a twenty-eight-sided indescribable figure; the fact that only four registered Negro voters are within the defined municipal limits; the fact that not a single white person is adversely affected by the new boundary. Could legislative purpose be more clearly evident if the statute had a preamble to the effect that the desired aim of the legislature was to remove all Negro voters in Tuskegee from municipal elections without in any way prejudicing the existing rights of any white citizens? It could not!

State action prohibited by the Constitution cannot be accomplished by indirection. *Guinn* v. *United States*, 238 U. S. 347 (1915); *Grosjean* v. *American Press Co.*, 297 U. S. 233 (1936); and *Lane* v. *Wilson*, 307 U. S. 268 (1939). As stated in *Lane* v. *Wilson*, "The (Fifteenth) Amendment nullifies sophisticated as well as simple-minded modes of discrimination." (*Supra*, at p. 275.) The parallel between this case and the *Guinn* case is striking. Here, as in that case, the legislative action would normally be within the scope of legitimate authority; here, as in that case, the statute is innocent on its face if no reference is made to surrounding circumstances. What appears as an innocuous but arbitrary statutory reference to an objective fact, a boundary here, a date there, is in fact a calculated scheme of discrimination because of other related objective facts. In *Guinn*, it was not mere coincidence that the date providing the exemption for literacy requirements was one before which no Negroes were registered to vote; in this case, it is not mere coincidence that the boundary line established excludes all but four registered Negro voters, but not one white voter.

Judge Parker has eloquently given expression to the contentions of the petitioners:

> "An essential feature of our form of government is the right of citizens to participate in the governmental process. The political philosophy of the

Declaration of Independence is that governments derive their just power from the consent of the governed; and the right to a voice in the selection of officers of government on the part of all citizens is important, not only as a means of insuring that government shall have the strength of popular support, but also as a means of securing to the individual citizen proper consideration of his rights by those in power. The Fourteenth and Fifteenth Amendments were written into the Constitution to insure to the Negro, who has recently been liberated from slavery, the equal protection of the law and the right to full participation in the process of government. These amendments have had the effect of creating a federal basis of citizenship and of protecting the rights of individuals and minorities from many abuses of governmental power which were not contemplated at the time. Their primary purpose must not be lost sight of, however, and no election machinery can be upheld if its purpose or effect is to deny to the Negro, on account of his race or color, any effective voice in the government of his country or the state or community wherein he lives." *Rice* v. *Elmore*, 165 F. 2d 387, 392 (C. A. 4, 1947).

B. In contravention of the Fourteenth Amendment, the Act denies the petitioners equal protection of the law, and takes property from them without due process of law.

It is the contention of the petitioners that the Act of the Alabama legislature has as its primary purpose the disenfranchisement of Negroes because of their race, but the effect of the statute not only abridges the right guaranteed by the Fifteenth Amendment, it also violates the protection afforded by the Fourteenth Amendment.

The principle that the rights and privileges which inure to citizens of a municipality are derivative of the obligations imposed by citizenship is not questioned. What is in issue is whether a state can deny such rights and privileges, while admittedly dissolving the concurrent obliga-

tions, where the basis for classification is undoubtedly the race or color of the persons involved. Petitioners did not contend that classification resulting from a redetermination of a municipal boundary is, in and of itself, invalid; but when the classification is based only on race or color, it is prohibited. As Justice Holmes said: "States may do a good deal of classifying that is difficult to believe rational, but there are limits, and it is too clear for extended argument that color cannot be made the basis of a statutory classification affecting the rights set up in this case." (*Nixon* v. *Herndon*, 273 U. S. 536, 541 (1927).)

Fire protection, police protection, sewerage disposal, street maintenance and zoning regulations are but typical of the benefits which citizens of a municipality enjoy and by which the value of their property is enhanced. To take from persons these advantages with the consequent loss of value to their property solely because of their race is clearly violative of the Fourteenth Amendment. It is again the legislative purpose which so thoroughly and pervasively taints the statute that brings it into conflict with the Constitution. The authority relied on by the court below adheres to the principle of the plenary power of a state legislature to alter municipal boundaries. This authority, however, is not applicable to the present case. The classification of petitioners because of their race or color resulting in decreased property values and unequal enjoyment of beneficial facilities is clearly prohibited by the Fourteenth Amendment:

> "The historical context in which the Fourteenth Amendment became a part of the Constitution should not be forgotten. Whatever else the framers sought to achieve, it is clear that the matter of primary concern was the establishment of equality in the enjoyment of basic civil and political rights and the preservation of those rights from discriminatory action on the part of the States based on consideration of race or color. Seventy-five years ago this Court announced that the provisions of the Amend-

ments are to be construed with this fundamental purpose in mind." *Shelley* v. *Kraemer*, 334 U. S. 1, 23 (1948).

To allow this statute to stand without even the introduction of evidence by petitioners sustaining their allegations is contrary to the long line of decisions of this Court construing the Fourteenth and Fifteenth Amendments. To allow this statute to stand provides legal sanction to a range of state activity which seeks to disregard and nullify the interpretation asserted by this Court. To allow this statute to stand denies petitioners protection from abridgment of their vital constitutional rights. "To do so would be to shut our eyes to what all others than we can see and understand." *United States* v. *Butler*, 297 U. S. 1, 61 (1936).

C. In contravention of the petitioners' constitutionally protected rights, the Act discriminates against petitioners solely because of race.

Though petitioners have no constitutional right to live in Tuskegee, they do have a constitutional right not to be excluded from Tuskegee because of their race. The infirmity of the statute challenged is its inherent use of race as a means of defining corporate limits. Race may never be the basis of the exercise of state power otherwise valid. *Yick Wo* v. *Hopkins*, 118 U. S. 356 (1886); *Hirabayashi* v. *United States*, 320 U. S. 81 (1943); *Steele* v. *Louisville & N. R. Co.*, 323 U. S. 192 (1944); *Buchanan* v. *Warley*, 245 U. S. 60 (1917); *Korematsu* v. *United States*, 323 U. S. 214 (1944).

Relieving petitioners of their civil obligations does not constitutionally justify the State in excluding petitioners from Tuskegee any more than relieving Negroes of paying local school taxes would constitutionally justify excluding them from public schools.

The question of the presence of racial discrimination in a statute may be determined from the effect of the statutes as well as from its stated purpose. The question is not what the enactment says or fails to say; but what in fact it does. *Dobbins* v. *City of Los Angeles*, 195 U. S. 223 (1904); see cases cited in Section II, *supra*. The bold statement of a racially discriminatory purpose of course assists a court in determining the statute's effect; the absence thereof, however, does not deprive a petitioner of the opportunity to charge and prove racial discrimination through legislative enactment.

We suppose that the petitioners would have an easier case to prove on trial—and the Court would have been more ready to void a statute which provided that Tuskegee's limits extend from a central point a radius of two miles but excluding every premise occupied by a Negro. However, the petitioners have charged and would be required to prove at trial substantially the same effect on them. Upon such proof, the effect of this statute—motive aside—is to exclude Negroes from Tuskegee. Is there any power in Alabama to legislate to this end?

Conclusion

For the foregoing reasons the decision of the court below affirming the District Court's sustaining of the motion to dismiss should be reversed.

Respectfully submitted,

LAWRENCE SPEISER,
1612 Eye Street, N. W.,
Washington 6, D. C.

CURTIS F. MCCLANE,
5 Maiden Lane,
New York, N. Y.

Attorneys for American Civil Liberties Union.

ROWLAND WATTS,
of Counsel.

SUPREME COURT OF THE UNITED STATES

No. 32.—October Term, 1960.

C. G. Gomillion, et al., Petitioners, v. Phil M. Lightfoot, as Mayor of the City of Tuskegee, et al. } On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

[November 14, 1960.]

Mr. Justice Frankfurter delivered the opinion of the Court.

This litigation challenges the validity, under the United States Constitution, of Local Act No. 140, passed by the Legislature of Alabama in 1957, redefining the boundaries of the City of Tuskegee. Petitioners, Negro citizens of Alabama who were, at the time of this redistricting measure, residents of the City of Tuskegee, brought an action in the United States District Court for the Middle District of Alabama for a declaratory judgment that Act 140 is unconstitutional, and for an injunction to restrain the Mayor and officers of Tuskegee and the officials of Macon County, Alabama, from enforcing the Act against them and other Negroes similarly situated. Petitioners' claim is that enforcement of the statute, which alters the shape of Tuskegee from a square to an uncouth twenty-eight-sided figure, will constitute a discrimination against them in violation of the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the Constitution and will deny them the right to vote in defiance of the Fifteenth Amendment.

The respondents moved for dismissal of the action for failure to state a claim upon which relief could be granted and for lack of jurisdiction of the District Court. The

court granted the motion, stating, "This Court has no control over, no supervision over, and no power to change any boundaries of municipal corporations fixed by a duly convened and elected legislative body, acting for the people in the State of Alabama." 167 F. Supp. 405, 410. On appeal, the Court of Appeals for the Fifth Circuit, affirmed the judgment, one judge dissenting. 270 F. 2d 594. We brought the case here since serious questions were raised concerning the power of a State over its municipalities in relation to the Fourteenth and Fifteenth Amendments. 362 U. S. 916.

At this stage of the litigation we are not concerned with the truth of the allegations, that is, the ability of petitioners to sustain their allegations by proof. The sole question is whether the allegations entitle them to make good on their claim that they are being denied rights under the United States Constitution. The complaint, charging that Act 140 is a device to disenfranchise Negro citizens, alleges the following facts: Prior to Act 140 the City of Tuskegee was square in shape; the Act transformed it into a strangely irregular twenty-eight-sided figure as indicated in the diagram appended to this opinion. The essential inevitable effect of this redefinition of Tuskegee's boundaries is to remove from the city all save only four or five of its 400 Negro voters while not removing a single white voter or resident. The result of the Act is to deprive the Negro petitioners discriminatorily of the benefits of residence in Tuskegee, including *inter alia*, the right to vote in municipal elections.

These allegations, if proven, would abundantly establish that Act 140 was not an ordinary geographic redistricting measure even within familiar abuses of gerrymandering. If these allegations upon a trial remained uncontradicted or unqualified, the conclusion would be irresistible, tantamount for all practical purposes to a mathematical demonstration, that the legislation is solely

concerned with segregating white and colored voters by fencing Negro citizens out of town so as to deprive them of their pre-existing municipal vote.

It is difficult to appreciate what stands in the way of adjudging a statute having this inevitable effect invalid in light of the principles by which this Court must judge, and uniformly has judged, statutes that, howsoever speciously defined, obviously discriminate against colored citizens. "The [Fifteenth] Amendment nullifies sophisticated as well as simple-minded modes of discrimination." *Lane* v. *Wilson*, 307 U. S. 268, 275.

The complaint amply alleges a claim of racial discrimination. Against this claim the respondents have never suggested, either in their brief or in oral argument, any countervailing municipal function which Act 140 is designed to serve. The respondents invoke generalities expressing the State's unrestricted power—unlimited, that is, by the United States Constitution—to establish, destroy, or reorganize by contraction or expansion its political subdivisions, to wit, cities, counties, and other local units. We freely recognize the breadth and importance of this aspect of the State's political power. To exalt this power into an absolute is to misconceive the reach and rule of this Court's decisions in the leading case of *Hunter* v. *Pittsburgh*, 207 U. S. 161, and related cases relied upon by respondents.

The *Hunter* case involved a claim by citizens of Allegheny, Pennsylvania, that the General Assembly of that State could not direct a consolidation of their city and Pittsburgh over the objection of a majority of the Allegheny voters. It was alleged that while Allegheny already had made numerous civic improvements, Pittsburgh was only then planning to undertake such improvements, and that the annexation would therefore greatly increase the tax burden on Allegheny residents. All that the case held was (1) that there is no implied

contract between a city and its residents that their taxes will be spent solely for the benefit of that city, and (2) that a citizen of one municipality is not deprived of property without due process of law by being subjected to increased tax burdens as a result of the consolidation of his city with another. Related cases, upon which the respondents also rely, such as *Trenton* v. *New Jersey*, 262 U. S. 182; *Pawhuska* v. *Pawhuska Oil Co.*, 250 U. S. 394; and *Laramie County* v. *Albany County*, 92 U. S. 307, are far off the mark. They are authority only for the principle that no constitutionally protected contractual obligation arises between a State and its subordinate governmental entities solely as a result of their relationship.

In short, the cases that have come before this Court regarding legislation by States dealing with their political subdivisions fall into two classes: (1) those in which it is claimed that the State, by virtue of the prohibition against impairment of the obligation of contract (Art. I, § 10) and of the Due Process Clause of the Fourteenth Amendment, is without power to extinguish, or alter the boundaries of, an existing municipality; and (2) in which it is claimed that the State has no power to change the identity of a municipality whereby citizens of a pre-existing municipality suffer serious economic disadvantage.

Neither of these claims is supported by such a specific limitation upon State power as confines the States under the Fifteenth Amendment. As to the first category, it is obvious that the creation of municipalities—clearly a political act—does not come within the conception of a contract under the *Dartmouth College* case. 4 Wheat. 518. As to the second, if one principle clearly emerges from the numerous decisions of this Court dealing with taxation it is that the Due Process Clause affords no immunity against mere inequalities in tax burdens, nor does it afford protection against their increase as an indirect consequence of a State's exercise of its political powers.

Particularly in dealing with claims under broad provisions of the Constitution, which derive content by an interpretive process of inclusion and exclusion, it is imperative that generalizations, based on and qualified by the concrete situations that gave rise to them, must not be applied out of context in disregard of variant controlling facts. Thus, a correct reading of the seemingly unconfined dicta of *Hunter* and kindred cases is not that the State has plenary power to manipulate in every conceivable way, for every conceivable purpose, the affairs of its municipal corporations, but rather that the State's authority is unrestrained by the particular prohibitions of the Constitution considered in those cases.

The *Hunter* opinion itself intimates that a state legislature may not be omnipotent even as to the disposition of some types of property owned by municipal corporations, 207 U. S., at 178–181. Further, other cases in this Court have refused to allow a State to abolish a municipality, or alter its boundaries, or merge it with another city, without preserving to the creditors of the old city some effective recourse for the collection of debts owed them. *Shapleigh* v. *San Angelo*, 167 U. S. 646; *Mobile* v. *Watson*, 116 U. S. 289; *Mount Pleasant* v. *Beckwith*, 100 U. S. 514; *Broughton* v. *Pensacola*, 93 U. S. 266. For example, in *Mobile* v. *Watson* the Court said:

> "Where the resource for the payment of the bonds of a municipal corporation is the power of taxation existing when the bonds were issued, any law which withdraws or limits the taxing power and leaves no adequate means for the payment of the bonds is forbidden by the Constitution of the United States, and is null and void." *Mobile* v. *Watson*, *supra*, 116 U. S., at 305.

This line of authority conclusively shows that the Court has never acknowledged that the States have power to do as they will with municipal corporations regardless of

consequences. Legislative control of municipalities, no less than other state power, lies within the scope of relevant limitations imposed by the United States Constitution. The observation in *Graham* v. *Folsom*, 200 U. S. 248, 253, becomes relevant; "The power of the State to alter or destroy its corporations is not greater than the power of the State to repeal its legislation." In that case, which involved the attempt by state officials to evade the collection of taxes to discharge the obligations of an extinguished township, Mr. Justice McKenna, writing for the Court, went on to point out, with reference to the *Mount Pleasant* and *Mobile* cases:

> "It was argued in those cases, as it is argued in this, that such alteration or destruction of the subordinate governmental divisions was a proper exercise of legislative power, to which creditors had to submit. The argument did not prevail. It was answered, as we now answer it, that such power, extensive though it is, is met and overcome by the provision of the Constitution of the United States which forbids a State from passing any law impairing the obligation of contracts. . . ." 200 U. S., at 253–254.

If all this is so in regard to the constitutional protection of contracts, it should be equally true that, to paraphrase, such power, extensive though it is, is met and overcome by the Fifteenth Amendment to the Constitution of the United States, which forbids a State from passing any law which deprives a citizen of his vote because of his race. The opposite conclusion, urged upon us by respondents, would sanction the achievement by a State of any impairment of voting rights whatever so long as it was cloaked in the garb of the realignment of political subdivisions. "It is inconceivable that guaranties embedded in the Constitution of the United States may thus be manipulated out of existence." *Frost & Frost Trucking Co.* v. *Railroad Commission of California*, 271 U. S. 583, 594.

The respondents find another barrier to the trial of this case in *Colegrove v. Green*, 328 U. S. 549. In that case the Court passed on an Illinois law governing the arrangement of congressional districts within that State. The complaint rested upon the disparity of population between the different districts which rendered the effectiveness of each individual's vote in some districts far less than in others. This disparity came to pass solely through shifts in population between 1901, when Illinois organized its congressional districts, and 1946, when the complaint was lodged. During this entire period elections were held under the districting scheme devised in 1901. The Court affirmed the dismissal of the complaint on the ground that it presented a subject not meet for adjudication.* The decisive facts in this case, which at this stage must be taken as proved, are wholly different from the considerations found controlling in *Colegrove*.

That case involved a complaint of discriminatory apportionment of congressional districts. The appellants in *Colegrove* complained only of a dilution of the strength of their votes as a result of legislative inaction over a course of many years. The petitioners here complain that affirmative legislative action deprives them of their votes and the consequent advantages that the ballot affords. When a legislature thus singles out a readily isolated segment of a racial minority for special discriminatory treatment, it violates the Fifteenth Amendment. In no case involving unequal weight in voting distribution that has come before the Court did the decision sanction a differentiation on racial lines whereby approval was given to unequivocal withdrawal of the vote solely from colored citizens. Apart from all else, these considerations lift this

*Soon after the decision in the *Colgrove* case, Governor Dwight H. Green of Illinois in his 1947 biennial message to the legislature recommended a reapportionment. The legislature immediately responded, 1947 Ill. Sess. Laws, p. 879, and in 1951 redistricted again. 1951 Ill. Sess. Laws, p. 1924.

controversy out of the so-called "political" arena and into the conventional sphere of constitutional litigation.

In sum, as Mr. Justice Holmes remarked, when dealing with a related situation, in *Nixon* v. *Herndon*, 273 U. S. 536, 540, "Of course the petition concerns political action," but "The objection that the subject matter of the suit is political is little more than a play upon words." A statute which is alleged to have worked unconstitutional deprivations of petitioners' rights is not immune to attack simply because the mechanism employed by the legislature is a redefinition of municipal boundaries. According to the allegations here made, the Alabama Legislature has not merely redrawn the Tuskegee city limits with incidental inconvenience to the petitioners; it is more accurate to say that it has deprived the petitioners of the municipal franchise and consequent rights and to that end it has incidentally changed the city's boundaries. While in form this is merely an act redefining metes and bounds, if the allegations are established, the inescapable human effect of this essay in geometry and geography is to despoil colored citizens, and only colored citizens, of their theretofore enjoyed voting rights. That was not *Colegrove* v. *Green*.

When a State exercises power wholly within the domain of state interest, it is insulated from federal judicial review. But such insulation is not carried over when state power is used as an instrument for circumventing a federally protected right. This principle has had many applications. It has long been recognized in cases which have prohibited a State from exploiting a power acknowledged to be absolute in an isolated context to justify the imposition of an "unconstitutional condition." What the Court has said in those cases is equally applicable here, *viz.*, that "Acts generally lawful may become unlawful when done to accomplish an unlawful end, *United States* v. *Reading Co.*, 226 U. S. 324, 357, and a constitutional power cannot be used by way of condition to attain an

unconstitutional result." *Western Union Telegraph Co.* v. *Foster*, 247 U. S. 105, 114. The petitioners are entitled to prove their allegations at trial.

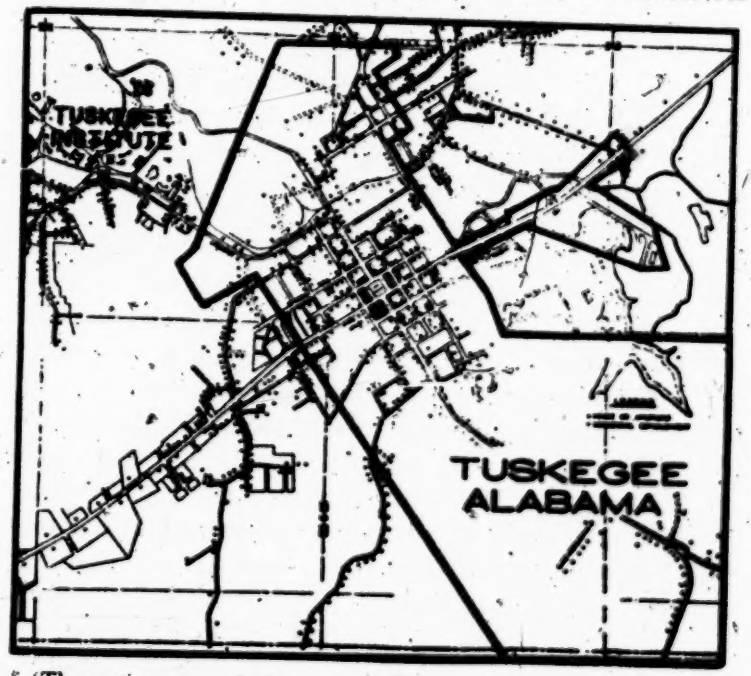
For these reasons, the principal conclusions of the District Court and the Court of Appeals are clearly erroneous and the decision below must be

Reversed.

MR. JUSTICE DOUGLAS, while joining the opinion of the Court, adheres to the dissents in *Colegrove* v. *Green*, 328 U. S. 549, and *South* v. *Peters*, 339 U. S. 276.

APPENDIX.

CHART SHOWING TUSKEGEE, ALABAMA, BEFORE AND AFTER ACT 140



(The entire area of the square comprised the city prior to Act 140. The irregular black-bordered figure within the square represents the post-enactment city.)

SUPREME COURT OF THE UNITED STATES

No. 32.—October Term, 1960.

C. G. Gomillion, et al., Petitioners, *v.* Phil M. Lightfoot, as Mayor of the City of Tuskegee, et al.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

[November 14, 1960.]

Mr. Justice Whittaker, concurring.

I concur in the Court's judgment, but not in the whole of its opinion. It seems to me that the decision should be rested not on the Fifteenth Amendment, but rather on the Equal Protection Clause of the Fourteenth Amendment to the Constitution. I am doubtful that the averments of the complaint, taken for present purposes to be true, show a purpose by Act 140 to abridge petitioner's "right . . . to vote," in the Fifteenth Amendment sense. It seems to me that the "right . . . to vote" that is guaranteed by the Fifteenth Amendment is but the same right to vote as is enjoyed by all others within the same election precinct, ward or other political division. And, inasmuch as no one has the right to vote in a political division, or in a local election concerning only an area in which he does not reside, it would seem to follow that one's right to vote in Division A is not abridged by a redistricting that places his residence in Division B *if* he there enjoys the same voting privileges as all others in that Division, even though the redistricting was done by the State for the purpose of placing a racial group of citizens in Division B rather than A.

But it does seem clear to me that accomplishment of a State's purpose—to use the Court's phrase—of "fencing

Negro citizens out of Division A and into Division B is an unlawful segregation of races of citizens, in violation of the Equal Protection Clause of the Fourteenth Amendment. *Brown* v. *Board of Education*, 347 U. S. 483; *Cooper* v. *Aaron*, 358 U. S. 1; and, as stated, I would think the decision should be rested on that ground—which, incidentally, clearly would not involve, just as the cited cases did not involve, the *Colegrove* problem.